Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID A. FIELDS, ROBERT P. WEISS and JACK D. STEWART,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD and FLORIDA POWER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals deprived petitioners of due process by applying the substantial evidence standard of review, instead of the *de novo* standard of review, to an administrative tribunal's summary judgment which dismissed without an evidentiary hearing petitioners' "whistleblower" complaints against their employer, despite the existence of genuine issues of material fact concerning the employer's affirmative defense that petitioners "deliberately" caused a violation of nuclear regulatory requirements.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed, and there is no parent or subsidiary company required to be listed by S. Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners David A. Fields ("Fields"), Robert P. Weiss ("Weiss") and Jack D. Stewart ("Stewart") pray that the United States Supreme Court grant a writ of certiorari to review the United States Court of Appeals for the Eleventh Circuit's opinion below.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 173 F.3d 811, and is reprinted in the appendix hereto, p. 1.

The Court of Appeals' order denying the petitioners' petition for rehearing with suggestion of en banc consideration is unreported, but is reprinted in the appendix hereto, p. 7.

The United States Department of Labor Administrative Review Board's final decision and order is reported at 1998 WL 122759, and is reprinted in the appendix hereto, p. 9.

The administrative law judge's recommended decision and order granting Respondent Florida Power Corporation's motion for summary decision is unreported, but is reprinted in the appendix hereto, p. 39.

JURISDICTION

The Court of Appeals entered its opinion on April 21, 1999, and denied petitioners' timely petition for rehearing with suggestion of en banc consideration on June 28,

1999. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in part, "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

2. Section 211(a) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851(a), provides in part:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
>
> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.). . . .
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . .

3. Section 211(g) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851(g), provides:

> Subsection (a) of this section [prohibiting discrimination] shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic

Energy Act of 1954, as amended [42 U.S.C. 2011 *et seq.*].

4. Title 29 C.F.R. 18.40(d) provides, in part, "The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

5. Title 29 C.F.R. 18.41(b) provides, in part, "Where a genuine issue of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing."

STATEMENT OF THE CASE

I. The Underlying Facts

This is a "whistleblower" case, brought pursuant to 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851 (the "ERA"). Petitioners held nuclear reactor operator licenses issued by the United States Nuclear Regulatory Commission (the "NRC"), and were employed as control room operators at a nuclear power plant owned by their employer, Respondent Florida Power Corporation (the "employer"). Fields was a Nuclear Shift Supervisor, Weiss was an Assistant Shift Supervisor, and Stewart as a Chief Nuclear Operator. Petitioners brought this action against their employer for alleged discriminatory and retaliatory acts to avoid adverse NRC regulatory attention as a direct consequence

of petitioners' protected activities when they disclosed that the employer had committed numerous nuclear regulatory violations promulgated under the Atomic Energy Act, 42 U.S.C. 2011 *et seq.*

Petitioners were responsible for the safe operation of the employer's nuclear reactor (App. 11, 41). One responsibility of a control room operator is to monitor hydrogen pressure and fluid levels in the Makeup Tank, a component of the reactor coolant system and part of the high pressure injection system used to cool and safely shut down the reactor in an emergency (App. 11, 42). The employer modified its high-pressure injection system so that in an emergency the Makeup Tank would drain before the source of fluid to the pump "crossed-over" to another tank (App. 11-12). Too much hydrogen pressure will cause the Makeup Tank to empty before the source of fluid to the pump could cross-over resulting in hydrogen intrusion into the pump and immediate cataclysmic failure. Failure of the high-pressure injection pump in an emergency may result in inadequate fluid necessary to cool the nuclear fuel and a catastrophe could ensue. Accordingly, it is imperative that the Makeup Tank is operated so that the pump will perform unhindered in an emergency.

In April 1993, the employer issued a new calculation, "Curve 8", to regulate the fluid and hydrogen pressure levels in the Makeup Tank and instructed its control room operators to maintain hydrogen pressure at the maximum allowable limits (App. 11-12). The employer issued Curve 8 an "operating curve" that should be well within the Makeup Tank's "design basis" requirements (App. 12). Merely exceeding an operational curve is not a violation

of a nuclear safety requirement (App. 12). In contrast, when a design basis is exceeded, the problem must be immediately corrected and reported to the NRC within one hour (App. 12). *See* 10 C.F.R. 50.72(b)(1)(ii)(B). It is undisputed that unbeknownst to Petitioners, Curve 8 was actually a design basis limit established to protect the pumps in an emergency (App. 15, 46).

The employer's directives to maintain maximum hydrogen pressure in the Makeup Tank concerned its control room operators (App. 12). In May 1994, petitioners tested the high-pressure injection system at the employer's request and discovered that the Makeup Tank's actual response was contrary to Curve 8 (App. 12-13). Petitioners reported their concerns in writing to the employer and received oral and written assurances that maintaining hydrogen pressure in accordance with Curve 8 was safe (App. 13). Petitioners and others raised further concerns about Curve 8 to no avail with the employer and the NRC's resident inspector at the plant (App. 13).

On September 2, 1995, the employer issued a written opinion that Curve 8 was accurate, "reasonably conservative," and safe, and that the issue would be closed (App. 13). Petitioners believed a response was necessary and on September 4 and 5, 1994 conducted operational "evolutions" not required by plant conditions to obtain data to show their concerns with Curve 8 were valid. It is undisputed that petitioners "believed that the planned evolution comported with existing procedures and was within their authority to perform" and "did not know that [Curve 8] was a design basis that should never be exceeded" (App. 13-15, 46).

The Makeup Tank exceeded Curve 8 during both evolutions (App. 14). The data gathered during the September 4th evolution was inconclusive (App. 14). Analysis of the September 5th data validated petitioners' safety concerns and showed that if the Makeup Tank was operated on or even in the acceptable region near Curve 8, hydrogen would enter the high-pressure injection pump during an emergency (App. 15). Petitioners prepared and submitted to their employer a Problem Report concerning the data obtained from the September 5th evolution (App. 15). The report did not mention the September 4 evolution, but Weiss informed a superior, Senior Licensing Engineer Paul Fleming, about it (App. 15).

In response to the September 5th evolution, the NRC instituted an investigation and the employer initially reassigned petitioners to other positions (App. 15). The employer's response to the NRC's investigation attempted to blame petitioners for the "unauthorized" September 5th evolution and minimized the significance of what petitioners had discovered. In response, Fields wrote his own letter to the NRC (App. 16). In July 1995, immediately prior to petitioners' appearance before the NRC, a manager asked Fields if another evolution had been performed, which Fields confirmed (App. 16). The employer subsequently discharged Fields and Weiss "for violation of procedures and failure to disclose the full intent, details and existence of the September 4 test for nearly 11 months." Stewart was reprimanded and transferred (App. 16-17). Petitioners allege that the employer's actions were a pretext to avoid unfavorable regulatory action from the NRC.

The NRC issued a Notice of Violation and Imposition of Civil Penalties to the employer finding it committed several serious violations of NRC requirements, including routinely exceeding Curve 8, a design basis curve (App. 17, 46). The NRC also found that petitioners conducted the evolutions to resolve safety issues that had not been adequately addressed by the employer (App. 17, 46). The NRC also wrote letters to petitioners stating that the unauthorized evolutions constituted a violation of the conditions of their license but did not take formal enforcement action (App. 17). Although the NRC recognized that petitioners' actions resolved a serious safety issue, the NRC reprimanded them for not raising the issue to higher levels of the NRC and their employer (App. 17-18, 48-50). Petitioners vigorously denied that the evolutions were "unauthorized" or that they had failed to meet the conditions of their licenses and requested a hearing to appeal the NRC's findings (App. 51). The NRC denied petitioners' request for a hearing, claiming that they were not entitled to one because no enforcement action had been taken against them (App. 51).

II. The Proceedings Below

The ERA provides certain remedies to employees of NRC licensees upon a showing of being subjected to discriminatory action for engaging in protected activity, such as providing notification of an alleged violation of the ERA or the Atomic Energy Act. Pursuant to ERA 211(a) (42 U.S.C. 5851(a)), Petitioners filed complaints with the United States Department of Labor (the "Department") in February 1996, alleging that their employer had

engaged in such discriminatory action. The Department assigned the case to an administrative law judge ("ALJ").

During the discovery phase of the case, the employer moved for a summary judgment pursuant to 29 C.F.R. 18.40 and 18.41. The motion asserted that ERA 211(g) (42 U.S.C. 5851(g)) barred petitioners' claims because they allegedly "deliberately" caused a violation of nuclear regulatory requirements. The requirements of 18.40 and 18.41 are essentially identical to those of Federal Rule of Civil Procedure 56, which governs summary judgments in civil court cases.

The ALJ conducted a non-evidentiary motion hearing to receive oral legal arguments on the employer's motion. The ALJ subsequently entered a written recommended decision, which included a list of matters he described as being "irrefutable facts" (App. 41, 60). The ALJ's irrefutable facts included the following:

- Petitioners "were concerned that Curve 8 . . . was invalid" and their concerns "were serious." Fields "believe[d] catastrophic events could happen[.]" "Weiss believed there was a potential for catastrophe at the plant[.]" "Stewart states the potential for catastrophe was that crews were operating in a region where a LOCA [loss of cooling accident] could occur[.]" (App. 42).

- Petitioners believed "they had a duty to verify a critical safety issue" (App. 42).

- "The intent [of the evolutions] was to give [the employer's engineering department] data that would convince them that there was a problem with the curve" (App. 44).

- Petitioners testified that they used a "routine procedure" which "was clearly within [their] authority to perform[.]" Fields testified that the evolutions were "within OP-402, a pre-approved procedure." (App. 45).

- Petitioners "did not know, at the time of their acts, that Curve 8 was a design basis." (App. 46).

Despite finding that the foregoing facts are irrefutably established in the record, the ALJ concluded that the employer's summary judgment motion should be granted pursuant to the affirmative defense of ERA 211(g) (42 U.S.C. 5851(g)). The ALJ's rationale was that 211(g) requires the employer to prove (1) the employee's act was done without the employer's direction; (2) the employee deliberately did an act; and (3) the act caused a violation of the ERA or Atomic Energy Act (App. 59-60). The ALJ ruled that Petitioners "deliberately caused a violation" as that phrase is used in 211(g), because they intentionally committed acts and those acts violated the law, irrespective of whether they knew those acts would violate the law (App. 63-64). Despite the NRC's prior denial of petitioners' request for a hearing, the ALJ concluded that petitioners caused a violation based upon his consideration of the NRC letters and reports and being "persuaded" by the findings therein (App. 65).

On March 13, 1998, the Department's Administrative Review Board (the "Board") issued its Final Decision and Order. Consistent with the ALJ, the Board held that Petitioners "believed that the planned evolution comported with existing procedures and was within their authority

to perform" (App. 13), and "did not know that [Curve 8] was a design basis that should never be exceeded" (App. 14-15). The Board also ruled as follows:

> [Petitioners] did not have actual knowledge that [the evolutions] would cause a violation of the ERA or the Atomic Energy Act, as [the employer's] actions demonstrate. The company presented Curve 8 to reactor operators as a conservative operating curve and there is no violation if such a curve is exceeded by a small amount. In addition, the annunciator light indicating that [Makeup Tank] pressure was too high had been triggered often in the months prior to September 1994. [Petitioners] suspected, but did not actually know, that Curve 8 was nonconservative. Indeed, it was only after [petitioners] conducted the unauthorized evolutions that [the employer's] managers learned definitely that Curve 8 was a design curve that should never be exceeded.

(App. 33).

In addition to conceding that petitioners had no knowledge that the evolutions would cause a violation, the Board rejected the ALJ's interpretation of 211(g) and held:

> [T]o establish a valid section 211(g) defense, a respondent must show that a complainant willfully or recklessly caused a violation of the ERA or the Atomic Energy Act, *that is, that the complainant acted with knowledge or with reckless disregard of whether his or her act would cause a violation.*

(App. 32; emphasis added). The foregoing interpretation of 211(g) is consistent with *McLaughlin v. Richland Shoe*

Co., 486 U.S. 128, 133 (1988) (willful violations for statute of limitations purposes under the Fair Labor Standards Act may be established if committed either knowingly or in reckless disregard); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-128 (1985) (adopting the "knowledge" or "reckless disregard" standard for the term "willful violations" under the Age Discrimination in Employment Act, 29 U.S.C. 626(b)).

Despite the foregoing "irrefutable facts" and corrected interpretation of 211(g), the Board nonetheless concluded as a matter of law, without an evidentiary hearing, that petitioners had "acted with reckless disregard of whether a violation . . . would occur" and that the employer had, therefore, established a valid 211(g) defense (App. 35). Accordingly, the Board granted the employer's summary judgment motion and dismissed petitioners' complaints (App. 35).

Petitioners timely appealed the Board's summary decision to the United States Court of Appeals for the Eleventh Circuit, and contended among other things, that summary judgment was erroneously granted because genuine issues of material fact exist and because a party's state of mind is an issue which is not generally susceptible to summary judgment. By opinion issued on April 21, 1999, the Court of Appeals affirmed the Board's summary decision. (App. 1-6).

Although the Court of Appeals' opinion twice acknowledges that the Board granted a summary judgment motion (App. 2, 4), the opinion inexplicably and inaccurately states that this occurred "[a]fter an evidentiary hearing" (App. 4). Instead of applying the *de novo*

standard of review, the Court of Appeals affirmed the Board's summary judgment on the grounds that it "was reasonable and supported by substantial evidence contained in the record" (App. 6). Petitioners' timely petition for rehearing with suggestion of en banc consideration was subsequently denied by the Court of Appeals' order dated June 28, 1999 (App. 7-8).

This timely petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION CONCERNING AN IMPORTANT ISSUE IS IN CONFLICT WITH THE DECISIONS OF ITS SISTER COURTS AND THIS COURT, REPRESENTS A GROSS MISCARRIAGE OF JUSTICE, AND SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE BY A LOWER TRIBUNAL, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Fifth Amendment to the United States Constitution is the cornerstone upon which the American justice system is built and upon which all litigants rely when seeking to vindicate their rights. The Due Process Clause of the Fifth Amendment contemplates that no person will be deprived of life, liberty or property without first having a meaningful opportunity to cross-examine witnesses and confront the evidence of an adverse party. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). It is a guarantee that this Honorable Court has been "zealous" to protect

from erosion – "not only in criminal cases . . . but in all types of cases where administrative and regulatory actions were under scrutiny." *Greene v. McElroy*, 360 U.S. 474, 497 (1959); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). Petitioners request this Court to honor that guarantee.

This is a case fraught with significant reversible error at every level. In recommending that the employer's motion for summary judgment be granted, the ALJ relied upon an erroneous construction of ERA 211(g) and weighed the evidence as to whether petitioners caused a violation. The Board subsequently employed the correct construction of 211(g), but went on to grant summary judgment, without benefit of a trial or evidentiary hearing, on the grounds that petitioners acted with "reckless disregard" as to whether their acts would cause a violation of law, despite the existence of evidence (and "irrefutable facts") in the record to the contrary. The Court of Appeals affirmed the Board's erroneous summary judgment, and compounded the error by crafting an unprecedented and unconstitutional exception to the *de novo* standard of review for summary judgment motions. These errors have deprived petitioners of their guaranteed Fifth Amendment due process rights.

The summary judgment was entered pursuant to 29 C.F.R. 18.40 and 18.41. Because those regulations impose the same requirements as Federal Rule of Civil Procedure 56 (App. 18-19, 67), a summary judgment entered pursuant to 18.40 and 18.41 must receive the same standard of review on appeal as a summary judgment entered pursuant to Rule 56. *See generally Agosto v. Immigration and Naturalization Service*, 436 U.S. 748, 756-758 (1978)

(where the applicable statutory language was virtually identical to summary judgment requirements of Rule 56, Congress intended the language to be interpreted similarly to that of Rule 56 and summary judgment principles are controlling); *Puerto Rico Aqueduct & Sewer Authority v. U.S. Environmental Protection Agency*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. den.*, 513 U.S. 1148 (1995) (Rule 56 is the prototype for administrative summary judgment procedures, and jurisprudence concerning that rule is the most fertile source of information about summary judgments); *John D. Copanos & Sons, Inc. v. Food & Drug Admin.*, 854 F.2d 510, 523 (D.C. Cir. 1988) (case law governing summary judgment applies with equal force in the context of administrative cases).

This Court and all other federal appellate courts (including the Eleventh Circuit) universally hold that summary judgments are reviewed *de novo*, applying the same standards as the lower tribunal. *See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466 (1992); *Dominique v. Weld*, 73 F.3d 1156, 1158 (1st Cir. 1996); *Bedoya v. Coughlin*, 91 F.3d 349, 351 (2d Cir. 1996); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996); *Higgins v. E.I. Du Pont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988); *King v. Ames*, 179 F.3d 370, 373 (5th Cir. 1999); *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996), *cert. den.*, 519 U.S. 1055 (1997); *Wilson v. Williams*, 997 F.2d 348, 350 (7th Cir. 1993); *McCaslin v. Wilkins*, 183 F.3d 775, 778 (8th Cir. 1999); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996), *cert. den.*, 118 S.Ct. 48 (1997); *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998); *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 918 (11th Cir.1993); *National Wildlife Federation v. Browner*,

127 F.3d 1126, 1128 (D.C. Cir. 1997). The foregoing list of cases is by no means exhaustive; a simple Westlaw search will reveal that there are literally thousands of appellate court decisions that apply the *de novo* standard of review to summary judgments. Even the Board, at pages 23-24 of its answer brief below, acknowledged that the summary judgment entered against Petitioners is subject to the *de novo* standard of review. The Court of Appeals' decision below represents a gross departure from this unanimously accepted standard of review by carving out an unprecedented and unconstitutional exception, which would allow summary judgments entered by administrative agencies to be affirmed if they are "reasonable and supported by substantial evidence contained in the record."

The Court of Appeals' opinion twice acknowledges that the Board granted a summary judgment motion (App. 2, 4), but then inexplicably and inaccurately states that this occurred "[a]fter an evidentiary hearing" (App. 4). Contrary to the opinion below, a "proceeding on motion for summary judgment *is not a trial* but in the nature of *an inquiry in advance of trial* for the purpose of determining whether there is a genuine issue of fact." *Hurd v. Sheffield Steel Corp.*, 181 F.2d 269, 271 (8th Cir. 1950) (emphasis added). Thus, perhaps based on its mistaken notion that an evidentiary hearing occurred, the Court of Appeals rejected the *de novo* standard of review, and instead, applied the substantial evidence standard of review, which appellate courts use to review factual determinations reached at a trial or evidentiary hearing after a finder of fact weighs conflicting evidence.

In applying the "substantial evidence" test, the Court of Appeals cites to *Kahn v. Secretary of Labor*, 64 F.3d 271 (7th Cir. 1995) and *Cornelius v. Sullivan*, 936 F.2d 1143 (11th Cir. 1991), among other cases. (App. 5). However, in every case cited, there was an evidentiary hearing conducted, wherein the parties had the opportunity to present evidence and cross-examine witnesses. None of the cited cases involved a summary judgment. Petitioners filed a motion for rehearing which, among other things, reminded the Court of Appeals that there had been no evidentiary hearing, but the motion was denied without explanation (App. 7-8).

The substantial evidence standard does not apply to the appellate review of summary judgments. Indeed, the standards for reviewing a summary judgment and a judgment based on an evidentiary hearing, are at opposite ends of the spectrum. When reviewing a decision based on an evidentiary hearing, the appellate court does not reweigh the evidence or substitute its judgment for the lower tribunal, but views the evidence in the light most favorable to the *appellee* and must *affirm* if there is record evidence to *support* the lower tribunal's decision. *See, e.g., Cornelius*, 936 F.2d at 1145. In contrast, when reviewing a summary judgment, the appellate court views the evidence in the light most favorable to the *appellant* and must *reverse* if there is record evidence that *does not support* the lower tribunal's decision. *See, e.g., U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-59 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986);

Dominique, 73 F.3d at 1158; *McCaslin*, 183 F.3d at 778; *Hartsel*, 87 F.3d at 799.

The same *de novo* review applies in the context of administrative summary judgments, as confirmed by this Court's decisions in *Agosto* and *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973). *Agosto* involved the question of whether a petitioner was entitled to a *de novo* determination of his claim for citizenship under the Immigration and Nationality Act, 8 U.S.C. 1105(a)(5)(B) (1976 ed.). Noting that the applicable statutory language was "virtually identical" to the summary judgment requirements of Rule 56, this Court held that "Congress intended the language to be interpreted similarly to that in Rule 56." *Agosto*, 436 U.S. at 754. Thus, the Court explained that the agency's summary decision was subject to *de novo* review at the appellate level:

> Since summary judgment principles are controlling here, it follows that a court of appeals cannot refuse to allow a *de novo* review of a citizenship claim if the evidence presented in support of the claim would be sufficient to entitle a litigant to trial were such evidence presented in opposition to a motion for summary judgment. More specifically, just as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented . . . so too a court of appeals is not at liberty to deny an individual a *de novo* hearing on his claim for citizenship because of the court's assessment of the credibility of the evidence. . . . Particularly where the evidence consists of the testimony of live witnesses concerning material factual issues, it will seldom if ever be appropriate to deny a *de novo* hearing,

> since "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised."
>
> . . . .
>
> Applying the appropriate standard to the record in this case, it is apparent that the Court of Appeals erred when it failed to transfer the case to the District Court for a *de novo* hearing. The Service's proof that petitioner is not a United States citizen would certainly be sufficient, if uncontradicted, to establish his birth in Agrigento, Italy, in July 1927. However, the evidence adduced by petitioner to support his claim of American citizenship creates "genuine issue[s] of material fact" that can only be resolved in a *de novo* hearing in the District Court.

Agosto, 436 U.S. at 758 (citations omitted).

In *Hynson*, this Court examined the Food and Drug Administration's administrative summary judgment procedure whereby the agency made summary determinations on whether applicants seeking approval of new drugs were entitled to an evidentiary hearing. The Court went on to explain that the substantial evidence standard of review only applies to agency determinations which are based on an evidentiary hearing:

> Under the Administrative Procedure Act, a court reviews agency findings to determine whether they are supported by substantial evidence *only in a case subject to the hearing* provisions of 5 U.S.C. §§ 556 and 557 *or "otherwise*

> *reviewed on the record of any agency hearing* provided by statute. . . . " 5 U.S.C. § 706(2)(E) . . . .

Hynson, 412 U.S. at 622, n. 19 (emphasis added).

Accordingly, the Court of Appeals' rejection of the *de novo* standard of review and reliance on the substantial evidence test to affirm the Board's summary judgment is in irreconcilable conflict with the precedent of its sister courts and of this Court, and represents a gross departure from the accepted and usual course of judicial proceedings. The Court of Appeals' opinion also establishes a dangerous new precedent, which could be relied upon to erode and deny the fundamental due process guarantee which this Court is sworn to zealously protect and which serves as foundation of our justice system.

In his famous argument to this Court in the case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), Daniel Webster declared that due process of law means "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Like Mr. Webster, this Court has recognized that "[t]he fundamental requirement of due process is the opportunity to be heard." *Goldberg*, 397 U.S. at 267. "The hearing must be 'at a meaningful time and in a meaningful manner.' " *Goldberg, citing Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The opportunity to be heard must be full and fair, not merely colorable or illusive. *Ryan's Furniture Exchange, Inc. v. McNair*, 162 So. 483, 487 (Fla. 1935).

Administrative agencies are not permitted to ignore the guarantee of due process. "[W]hen governmental

agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960). "In the administrative context, due process requires that interested parties be given a reasonable opportunity to know the claims of adverse parties *and an opportunity to meet them.*" *North Alabama Express, Inc. v. U.S.*, 585 F.2d 783 (5th Cir. 1978) (emphasis added). The right of confrontation "is especially important" to administrative procedures where credibility disputes exist. *Cuellar v. Texas Employment Comm.*, 825 F.2d 930, 935 (5th Cir. 1987), *citing Greene*, 360 U.S. at 496.

It has been held that "[d]ue process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case can only be decided one way." *Puerto Rico Aqueduct*, 35 F.3d at 606, *citing, Hynson*, 412 U.S. at 621. However, petitioners submit that the converse of this proposition is also true – due process *does* require an agency to convene an evidentiary hearing when it *does not* appear conclusively from the available evidence that the case can only be decided one way.

"It is not the purpose of a summary judgment to deny to litigants a right of trial if they really have issues to try." *National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962), *citing Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Associated Press v. U.S.*, 326 U.S. 1 (1945); *Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426 (1948). Accordingly, rules

authorizing summary judgment "should be invoked cautiously in order to allow a full trial where there is a bona fide dispute of facts between the parties." *National Screen*, 305 F.2d at 651. "Great caution should be exercised in granting a summary judgment because it borders on the denial of due process." *Podlesak v. Wesley*, 849 S.W.2d 728, 731 (Mo. App. S.D. 1993), *citing*, *Olson v. Auto Owners Ins. Co.*, 700 S.W.2d 882, 884 (Mo. App. 1985). A summary judgment which is granted despite the existence of genuine issues of material fact, clearly crosses that border and violates due process.

In *Johnson Foils, Inc. v. Huyuck Corp.*, 61 F.R.D. 405, 407 (N.D.N.Y. 1973), the court observed:

> Summary judgment is a very drastic remedy. It says to the losing party that the court is so certain that nothing you have said even raises a material issue that *you will be denied an opportunity to have a day in court on your claims.* . . . The emphasis in a motion for summary judgment is that *a court must be certain that it is not depriving a party of the fundamental right to a trial.*

(Emphasis added). *See also Heyman v. Commerce & Industry Ins. Co.*, 524 F.2d 1317 (2d Cir. 1975) (summary judgment is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury).

Appellate courts often describe summary judgment as a drastic remedy and instruct trial judges to exercise caution in granting one, because the erroneous entry of a summary judgment deprives the nonmoving party of his or her due process right to a trial. For example, in *Doehler*

Metal Furniture Co. v. U.S., 149 F.2d 130, 135 (2d Cir. 1945), the court stated that summary judgment, when "wisely used, is a praiseworthy time-saving device" but warned the trial court that "[a] litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable." *Id.* The court also observed that the "[d]enial of a trial on disputed facts is worse than delay." Similarly, in *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996), the court held that a summary judgment entered without proper notice deprived the nonmoving party of due process and was void.

Because an improvidently granted summary judgment robs the nonmoving party of his due process right to present live testimony, cross-examine witnesses, and otherwise confront his opponent's evidence, 29 C.F.R. 18.41(b) mandates that the ALJ "shall . . . set the cause for an evidentiary hearing" if "a genuine issue of material fact is raised" by the nonmoving party. Absent this mandate, due process is denied.

Accordingly, a summary judgment for the employer would have only been appropriate if the pleadings, affidavits, and discovery materials in the record established that no genuine issue of material fact exists on its affirmative defense that petitioners "deliberately" caused a violation of the ERA or the Atomic Energy Act. 29 C.F.R. 18.40(d). *See also, e.g.*, Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322. Neither the ALJ, nor the Board, nor the Court of Appeals were permitted to weigh the evidence, but were instead required to determine whether a genuine issue exists for trial. *Liberty Lobby*, 477 U.S. at 249.

At this juncture, it is important to note that "[i]ssues of motive and intent are usually inappropriate for disposition on summary judgment." *Wechsler v. Steinberg*, 733 F.2d 1054, 1058 (2d Cir. 1984). As the Eleventh Circuit itself has observed:

> The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind. *Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the [fact finder] should be given the opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.*

Sammons v. Taylor, 967 F.2d 1533, 1545 (11th Cir. 1992) (emphasis added), *quoting Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1970). *Accord In re Varrasso*, 37 F.3d 760, 764 (1st Cir. 1994); *Provenz*, 102 F.3d at 1489.

At the core of due process is the requirement that a litigant be permitted to make a live presentation of his or her evidence to the fact finder. As this Court observed in *Goldberg*, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.*, 397 U.S. at 269. Thus, it follows that when issues of credibility and veracity are at stake, "written submissions are a *wholly unsatisfactory* basis for decision." *Id.* (emphasis added).

In this case, petitioners were never given the opportunity to have the ALJ, as fact finder, observe their demeanor as they testified concerning their own states of

mind, or observe the demeanor of their adversary's witnesses as they were cross-examined. Under these circumstances, it was "wholly unsatisfactory" and a denial of due process for the Board to weigh evidence depicted by a cold written transcript to reach a determination that petitioners acted with "reckless disregard" of whether their actions would cause a violation of law. The Court of Appeals took the Board's improper factual determination one step further by concluding:

> It is clear from the record that, regardless of their motives, good or bad, petitioners *moved knowingly and dangerously* beyond their authority when, on their own, and *fully aware* that their employer would not approve, they conducted experiments inherently fraught with danger.

(App. 6; emphasis added). In this regard, the Court of Appeals' opinion is internally inconsistent with its prior recap of the record, which states:

> They [petitioners] contend that they *believed* the tests complied with *existing procedures and were within their authority to perform*. Petitioners claim that, as licensed nuclear operators, they *owed a duty to the public* to verify a critical safety issue that they believed was being ignored by FPC.

(App. 3; emphasis added). The record contains additional support for petitioners' beliefs, including the affidavit of NRC inspector Larry King (R26, Ex. 71), the NRC's findings that another shift supervisor held the same belief (R36: Ex. 50-21-23), the deposition testimony of every person on Field's crew, and the ALJ's "irrefutable facts."

Under the substantial evidence test, the Court of Appeals' evaluation of the conflicting record evidence

may have been permissible. However, under the appropriate *de novo* summary judgment standard of review, the evidence should have been evaluated in the light most favorable to petitioners. *De novo* review would have revealed genuine issues of material fact and reversible error. The Eleventh Circuit had a duty to correct the error and preserve petitioners' guaranteed due process rights. Petitioners pray this Court will honor that guarantee by granting certiorari and preventing the Court of Appeals' error from supplying precedent for future due process violations.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

A. Court of Appeals' Decision..... App. 1

B. Court of Appeals' Order Denying Petition for Rehearing and Rehearing En Banc.....App. 7

C. Administrative Review Board's Final Decision and Order.....App. 9

D. Administrative Law Judge's Recommended Decision and Order Granting Respondent's Motion for Summary Decision..... App. 39

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2614

D.C. Docket No. 97-070(ARB); 96-ERA-22(ALJ)

DAVID A. FIELDS, ROBERT P. WEISS, et al.,

Petitioners,

versus

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD,

Respondent.

Appeal from a Final Decision and Order of the
United States Department of Labor's
Administrative Review Board

(April 21, 1999)

Before MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and ADAMS*, District Judge.

PER CURIAM:

Petitioners David A. Fields, Robert P. Weiss and Jack D. Stewart appeal the final decision and order issued by

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* Honorable Henry Lee Adams, Jr., U.S. District Judge for the Middle District of Florida, sitting by designation.

the Administrative Review Board (ARB) of the Department of Labor (DOL), accepting the recommendation of the DOL Administrative Law Judge (ALJ), granting Florida Power Corporation's (FPC) request for summary decision and dismissing petitioners' complaints under the employee protection (or whistleblower) provision, Section 211, of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851(1)(D) (1988).[1] The provisions subsumed under Section 211 prohibit an employer from discharging or discriminating against an employee who has engaged in protected activities. Petitioners contend that the ARB's finding that their complaints were barred under the affirmative defense provision of Section 211(g)[2] is not supported by substantial evidence. We disagree and affirm.

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[1] Section 211(a), 42 U.S.C. § 5851(a), provides in relevant part:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
>
> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 *et seq.*);
>
> * * *

[2] Section 211(g), 42 U.S.C. § 5851(g), provides:

> Subsection (a) of this section [prohibiting discrimination] shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 *et seq.*].

Petitioners were control room operators at FPC's Crystal River 3 nuclear power plant (the plant). They were concerned that maintaining hydrogen pressure in accordance with FPC's mandated procedure (designated Curve 8[3]) was unsafe and notified the engineering department. They were not satisfied with the engineering department's assurance that maintaining pressure according to Curve 8 was "accurate and reasonably conservative." Petitioners felt that their safety concerns had not been adequately addressed and that they needed to respond. In order to obtain data that would show whether their concerns about Curve 8 were valid, petitioners decided to conduct their own tests. They contend that they believed the tests complied with existing procedures and were within their authority to perform. Petitioners claim that, as licensed nuclear operators, they owed a duty to the public to verify a critical safety issue that they believed was being ignored by FPC.

The undisputed facts are that in September 1994, petitioners performed tests on the plant's nuclear reactor during two midnight shifts, while the nuclear reactor was operating at full power. On the first night, September 4, their actions triggered an alarm light for forty-three minutes. Petitioners ignored the alarm and continued. When the September 4 data proved inconclusive, they tried again. On the second night, September 5, petitioners told an auxiliary building operator to "dress out" in protective clothing, to allow him to vent hydrogen quickly should

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[3] For further background and description as to the nuclear tests performed, refer to the background section of the ARB's Final Decision and Order dated March 1, 1998.

an accident occur. This time the alarm light was triggered for thirty-five to thirty-seven minutes.

Following the September 5 test, petitioners prepared a problem report. They did not mention the September 4 test. In response to the problem report, FPC transferred petitioners to positions other than as control room operators. The Nuclear Regulatory Commission (NRC) instituted an investigation. When FPC subsequently learned of the September 4 test, it discharged Weiss and Fields and transferred Stewart out of operations with a written reprimand.

Thereafter petitioners filed this Section 211 discrimination action with the DOL, alleging that FPC disciplined them, demoted Stewart, and discharged Fields and Weiss because they were engaging in activities protected under the ERA. After an evidentiary hearing, the DOL ALJ concluded that the undisputed facts provided overwhelming evidence that petitioners had acted deliberately and without direction from FPC management when they twice conducted unauthorized tests on the nuclear reactor. He issued a recommended decision and order granting FPC's motion for summary decision. Petitioners appealed to the ARB. In its final decision and order, the ARB accepted the recommendation of the ALJ, concluding that FPC's decision to discharge and demote petitioners was based upon petitioners' "reckless disregard" as to whether a nuclear safety violation would occur and that they "deliberately caused a violation" of nuclear safety regulations. Finding no genuine issue of material fact, the ARB determined that FPC had established a valid Section 211(g) affirmative defense as a matter of law and dismissed the complaints. Petitioners now complain

that the ARB erred in finding that they had acted without direction from FPC deliberately to cause violations of NRC requirements.

In reviewing cases arising under the ERA, we are required to conform to the standard of review set forth in the Administrative Procedure Act. 42 U.S.C. § 5851(c)(1). Thus the ARB decision will be overturned only if it "is unsupported by substantial evidence or if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E); *Kahn v. Secretary of Labor*, 64 F.3d 271, 276 (7th Cir. 1995) (citing *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 516-17 (9th Cir. 1989)); *see also Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1571 (11th Cir. 1997). The substantial evidence test is no more than a recitation of the application of the 'arbitrary and capricious' standard to factual findings. *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1397 (11th Cir. 1998). Appropriate deference must be given to statutory interpretation by the ARB. *See Stone & Webster*, 115 F.3d at 1571 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Bechtel Construction Co. v. Sec. of Labor*, 50 F.3d 926, 931 (11th Cir. 1995)). The reviewing court does not reweigh the evidence or substitute its judgment for that of the ARB, but reviews the entire record to determine if the decision reached is reasonable and supported by substantial evidence. *Cornelius v. Sullivan*, 936 F.2d 1143, 1145 (11th Cir. 1991).

It is clear from the record that, regardless of their motives, good or bad, petitioners moved knowingly and dangerously beyond their authority when, on their own, and fully aware that their employer would not approve,

they conducted experiments inherently fraught with danger. The tests conducted during the midnight shifts were expected by petitioners to produce conditions sufficiently perilous to set off alarms. While it is possible that they meant, by their actions, to demonstrate that prescribed FPC policy was dangerous, it is clear that petitioners' unauthorized frolics were just what Congress envisioned when it made the whistleblower statute inapplicable to "any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter. . . ." Section 211(g), 42 U.S.C. § 5851(g).

Giving appropriate deference to the ARB's interpretation of the statute, *Stone & Webster*, 115 F.3d at 1571, we conclude that its determination was reasonable and supported by substantial evidence contained in the record. *Cornelius*, 936 F.2d at 1145. We affirm the decision of the ARB.

AFFIRMED.

IN THE UNITES STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2614

DAVID A. FIELDS, ROBERT P. WEISS, et al.,

Petitioners,

versus

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD,

Respondent.

Appeal from a Final Decision and Order
of the United States Department of
Labor's Administrative Review Board

(Filed Jun. 28, 1999)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

BEFORE: MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and ADAMS*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

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* Honorable Henry Lee Adams, Jr., U.S. District Judge for the Middle District of Florida, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

[SEAL]

In the Matter of:

DAVID A. FIELDS, ROBERT P. WEISS, and JACK D. STEWART,

COMPLAINANTS,

v.

FLORIDA POWER CORPORATION,

RESPONDENT.

ARB CASE NO. 97-070

ALJ CASE NO. 96-ERA-22

DATE: MAR 13 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under Section 211, the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), codified at 42 U.S.C. § 5851 (1988 and Supp. V 1993).[1] David A. Fields (Fields) and

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[1] Section 211(a), 42 U.S.C. § 5851(a), provides in relevant part:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
>
> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

Robert P. Weiss (Weiss) alleged that Florida Power Corporation (FPC or Florida Power) violated the ERA when it discharged them from employment. Jack D. Stewart (Stewart) alleges that his demotion violated the ERA.[2]

In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) granted FPC's motion for summary decision, which was based upon subsection (g) of Section 211 (Section 211 (g)), on the ground that Complainants deliberately caused a violation of the ERA and were not entitled to its protection for whistleblowers.[3] The ALJ articulated a three part test for establishing a Section 211 (g) defense and applied it to the facts of this case. We modify the ALJs statement of the "test" to be applied to a Section 211 (g) defense, find that FPC has established the defense in this case, and dismiss the complaint.

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* * *

[2] We will refer to Fields, Weiss, and Stewart collectively as "Complainants."

[3] Section 211 (g) provides in relevant part:

> Subsection (a) of this section shall not apply with respect to any employee who, acting, without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter [the ERA] or of the Atomic Energy Act of 1954. . . .

42 U.S. C. § 5851 (g). Section 211 (g) provides an affirmative defense on which the respondent bears the burden of proof. *See James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Final Dec. and Ord., Mar. 15, 1996, slip op. at 6 (stating that the respondent did not show by a preponderance of evidence that the complainant deliberately caused a violation).

BACKGROUND[4]

Fields was a Nuclear Shift Supervisor at the Crystal River 3 nuclear plant (CR-3) in Florida, which FPC operates. Complaint at p. 1 (C. at 1).[5] Weiss was an Assistant Shift Supervisor and Stewart was one of two Chief Nuclear Operators under Fields's direction. The three Complainants, who held reactor operator licenses issued by the Nuclear Regulatory Commission (NRC), worked together as control room operators on the "A Shift" at CF-3. C. at 2.

One of the responsibilities of control room operators is to monitor the level of hydrogen pressure in a storage vessel called the Makeup Tank (MUT), which is part of the makeup system at the plant. C. at 4. The makeup system is designed to maintain water levels in the reactor coolant system and is one of the primary safety systems in the event of a loss of coolant accident. C. at 4-5.

Prior to April 1993, the hydrogen pressure in the MUT was maintained below a limit of 12 psig. C at 6 and CX 6.[6] That month, FPC issued a new calculation, called

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[4] Since the recommendation to dismiss this case was made on summary grounds and determination of disputed factual issues is not necessary to render this decision, we do not make any factual findings.

[5] Reference is to the complaint filed by Fields. Weiss and Stewart filed shorter complaints that incorporated Fields' lengthier complaint and attachments.

[6] "CX" refers to Complainants' exhibits attached to the Complaint and to their opposition to the motion for summary decision; "RX" refers to Respondent's exhibits attached to its motion.

Curve 8, that varied the amount of hydrogen pressure according to the amount of water in the MUT. Under the new Curve 8, the more water there was in the MUT, the higher the amount of hydrogen pressure allowed. C at 6-7 and CX 2. FPC management instructed control room operators to maintain the hydrogen pressure in the MUT at the maximum level allowed by the new Curve 8. C. at 8.

FPC considered Curve 8 to be a conservative "operating curve" because it supposedly included a margin of error and was presumed to be well within the "design basis" requirements of a nuclear power plant. C. at 7. Merely exceeding an operational curve is not a violation of a nuclear safety requirement. In contrast, when a design basis is exceeded, the company must correct the problem immediately, report the event within one hour to the NRC, and issue a Licensee Event Report within 30 days. C. at 8.

Complainants were concerned that maintaining hydrogen pressure in accordance with Curve 8 was unsafe and notified the Engineering Department and the Manager of Nuclear Operations, Greg Halnon. C. at 9. Complainants were not satisfied with the Department's assurance that maintaining pressure according to Curve 8 was safe. *Id.*

On May 10, 1994, during the performance of a scheduled test procedure ordered by management, the A shift operators plotted the MUT's actual tank response and pressure levels when draining the tank and noted that pressure levels were tending towards the unacceptable region in Curve 8. C. at 10. Complainants' coworker,

Mark VanSicklen, prepared a Problem Report informing managers about the concern with Curve 8 and included the actual data obtained during the test. C. at 10 and CX 3.

FPC managers continued to direct CR-3 operators to maintain the maximum hydrogen pressure allowed under Curve 8. C. at 11; CX 4, 5. The A Shift operators continued to raise concerns about Curve 8 with their managers to no effect. C. at 13. VanSicklen raised the issue with the NRC resident inspector, who suggested that if Complainants did not like management's response, they should submit a formal allegation to the NRC. C. at 15.

On September 2, 1994, Operations Support Manager Carl Bergstrom showed Fields a draft memorandum from Engineering stating that Curve 8 was accurate, "reasonably conservative," and safe, and that the issue would be closed. C. at 15 and CX 9. A handwritten notation on the memorandum indicated that it was a "draft recommendation" and that Fields should review it and provide comments to his immediate supervisor, Halnon. CX 9.

The A Shift operators discussed an appropriate response to the draft letter closing out the Problem Report on Curve 8. C. at 16. They decided to conduct an operational "evolution," not required by plant conditions, to obtain data that would show whether their concerns about Curve 8 were valid. No one consulted the Engineering Department, FPC managers, or the NRC concerning the plan. Complainants believed that the planned evolution comported with existing procedures and was within their authority to perform. C. at 16-17.

The operators added hydrogen to the MUT when it was at the maximum water level. C. at 20. Their actions triggered a control room annunciator alarm light ("Makeup Tank Pressure High"), indicating that the tank pressure was too high for the level of water. C. at 18. Complainants kept the hydrogen pressure constant while they rapidly reduced the water level. Therefore, the alarm light continued to be triggered for 43 minutes.[7]

The data gathered during the September 4 evolution was inconclusive and Complainants decided to try the evolution again the next night. C. at 20-23. Again, Complainants did not notify managers or the NRC of their intent to perform an unscheduled evolution.

On September 5 the Complainants told the auxiliary building operator to "dress out," or wear protective clothing that would allow him quickly to vent hydrogen from the MUT should a loss of coolant accident occur during the evolution. C. at 23. The Complainants again added hydrogen to the MUT when it was at its upper limit of water. This time they waited 30 minutes before reducing the water level and the annunciator alarm light was triggered after the water reduction began. *Id.* The alarm was triggered for 35 to 37 minutes during the September 5 evolution. *Compare* C. at 23 and R. D. and O. at 4, ¶ 9.

At the time of the evolutions, although Complainants suspected that Curve 8 was nonconservative, they did not

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[7] CR-3 Annunciator Response procedure AR-403 requires operators to reduce pressure to within acceptable limits upon receipt of an alarm. CX 10.

know that it was a design basis that should never be exceeded. C. at 7, 27. The data from the September 5 evolution showed that the actual system response exceeded the limits of Curve 8 and eventually led to the Engineering Department's acknowledgment that the curve was a design basis curve. C. at 26-28.

Complainants prepared a Problem Report following the September 5 evolution. C. at 24; CX 14. The Problem Report did not mention the September 4 evolution, C. at 25-26, although Weiss did voluntarily inform a superior, Senior Licensing Engineer Paul Fleming, about it. C. at 26. Fields and Weiss did not include the first evolution in a written chronology of events, C. Ex. 18, or mention it in numerous meetings with FPC managers and attorneys. C. at 40; Fields Dep. at 257. In response to the September 5 incident, FPC took the A Shift operators "off shift," which meant that they no longer operated a reactor. C. at 34. Fields was reassigned to the position of support shift supervisor, an administrative position. C. at 38. Weiss was transferred to another position as well. *Id.*

In response to FPC's notification of the September 5 evolution, the NRC's Office of Investigations (NRC-OI) instituted an investigation. Complainants did not tell NRC-OI staff about the earlier evolution.[8] RX 53, 54, 55.

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[8] Prior to the meetings with NRC-0I staff, Fields told Weiss that he would not mention the September 4 evolution unless NRC-0I investigators asked him about it. Fields Dep. at 260; Weiss Dep. at 263. Complainants attribute this reticence to the advice of FPC counsel not to volunteer information to the NRC. C. at 47; Weiss Dep. at 263.

FPC allowed Fields to review a draft letter to the NRC explaining, the September 5 evolution. C. at 41. Fields and Weiss disagreed strongly with the tenor of the letter, which completely blamed them for the two unauthorized evolutions, and Fields told managers that he would write his own letter to the NRC. *Id.; see also* CX 34 (FPC letter to NRC) and CX 35 (Fields letter to NRC).

When an FPC manager told Fields there were rumors of a second unauthorized evolution, Fields informed management in July 1995 for the first time about the September 4 evolution. C. at 47. FPC immediately placed the Complainants on administrative leave. C. at 49. The company discharged Fields and Weiss "for violation of procedures and failure to disclose the full intent, details, and existence of the September 4, 1994 test for nearly 11 months following occurrence." C. at 50 and CX 45. For his role in the unauthorized evolutions, Stewart was transferred to a position outside of operations and received a written reprimand. *Id.*

In its report, the NRC-0I report found that:

> the shift supervisor, assistant shift supervisor, and two chief operators on the midnight shift of September 4 and 5, 1994, deliberately conducted an evolution, not required by plant conditions, for the specific purpose of gathering data. Furthermore, when the allowable makeup tank over pressure was exceeded, the operators deliberately delayed taking appropriate action to reduce makeup tank over pressure while gathering that data.

RX 64, Synopsis, at 1.

A later NRC Notice of Violation and Imposition of Civil Penalties states that FPC committed several violations of NRC requirements, including routinely exceeding Curve 8, which actually was a design basis curve. RX 58 at 2. The NRC also found that Complainants' two unauthorized tests violated its regulations. RX 58, Enclosure I at 2.[9] The NRC acknowledged that Complainants conducted the evolutions to resolve safety issues that had not been addressed adequately by FPC. *Id.* The NRC also concluded that the September 4 and 5 violation "resulted from the independent actions of a single shift operating crew" but found that "FPC as the employer of the operators involved bears responsibility for their actions as employees." *Id.*

In letters to each Complainant, the NRC stated that the unauthorized evolutions constituted a violation of the conditions of an operator's license but determined not to take formal enforcement action against the Complainants. RX 61, 62. The agency noted that FPC already had revoked the Complainants' operator licenses. *Id.* Although the NRC recognized that Complainants contributed to something good – the determination that Curve 8 was in error and nonconservative, and that the plant periodically had been operated outside its design basis –

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[9] The NRC determined that the Complainants' "conduct of unauthorized tests of MUT over pressure without preparation of the required written safety evaluations" violated 10 C.F.R. § 50.59. C. Ex. 58, Enclosure I at 2. The NRC promulgated the regulations at 10 C.F.R. Part 50 pursuant to the Atomic Energy Act and the ERA. 10 C. F. R. § 50.1. Therefore, we deem a violation of these regulations to constitute a violation of the Atomic Energy Act and the ERA.

the agency also chastised Complainants for not raising the issue with the NRC's Regional Office or Headquarters. *Id.*

THE ALJ'S RECOMMENDED DECISION

Complainants filed complaints with the Department of Labor in February 1996 alleging that FPC disciplined all of them, demoted Stewart, and fired Fields and Weiss because they engaged in activities protected under the ERA. FPC moved for summary decision, citing Section 211(g). Complainants opposed the motion on the ground that they did not deliberately cause a violation since they did not know that the evolutions would cause a violation of the ERA.

The ALJ announced a three part test for establishing a Section 211 (g) affirmative defense: (1) that the act was done without direction from the employer, (2) that complainants deliberately did an act, and (3) that the act caused a violation of ERA or AEA requirements. R. D. and O. at 16. The ALJ found that Complainants' actions satisfied the three part test and granted FPC's motion for summary decision.

DISCUSSION

The standard for granting summary decision in whistleblower cases, 29 C.F.R. § 18.40 and 18.41, is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e): moving parties must show that there is no material issue of fact and that they are entitled to prevail as a matter of law. *Freels v. Lockheed Martin Energy Systems,*

Inc., Case Nos. 94-ERA-6 and 95-CAA-2, Final Dec. and Order, Dec. 4, 1996, slip op. at 5 and cases there cited, *appeal dismissed sub nom. Freels v. Secretary of Labor*, Nos. 97-3117 & 97-3383 (6th Cir. Dec. 31, 1997). The facts are considered in the light most favorable to the party opposing the motion for summary decision. *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Sec. Dec. and Rem. Ord., July 17, 1995, slip op. at 5. An opposing party "may not rest upon mere allegations or denials [in the] pleading[s], but must set forth specific facts showing that there is a genuine issue for trial" and "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986).

To determine if summary decision is warranted, we will examine the showing required of FPC under Section 211 (g), beginning with a determination whether Complainants acted without direction from their employer.

Complainants Acted Without Direction from FPC

It is undisputed that FPC did not expressly direct Complainants to conduct the evolutions on September 4 and 5, but that does not end the inquiry. Complainants argue that an employee acting under the "implied authority" of the employer has acted with the employer's direction. *See* Comp. Br. at 26.

In *Dotson v. Anderson Heating and Cooling, Inc.*, Case No. 95-CAA-11, ALJ Rec. Dec. and Ord., Oct. 2, 1995, *adopted in* ARB Fin. Dec. and Ord., July 17, 1996, which arose under the Clean Air Act's (CAA) analogous

employee protection provision,[10] Environmental Protection Agency (EPA) regulations promulgated under the CAA required workers in the heating and cooling trade to pass a certification test on refrigeration. After failing the test the first time, the complainant, Dotson, participated with his coworkers in cheating during the second administration of the test. The ALJ stated:

> There is no evidence in the record to support a conclusion that [Dotson's employer] Anderson explicitly ordered his employees to participate in the cheating activities which occurred during the October 31 examination. Therefore, *if there is to be a finding of direction by Anderson, it would have to be implied from the circumstances surrounding the testing.* (Emphasis added).

ALJ Rec. Dec. and Ord., slip op. at 19.

Complainants contend that there is a genuine issue of material fact concerning whether they conducted the evolutions under implied authority from FPC management. Comp. Br. at 26. As support for implied authority, Complainants initially cite statements of the NRC in letters declining formal enforcement action against them:

> Performance of an unauthorized evolution affecting safety systems is a significant violation. However, after considering the results of

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[10] The Clean Air Act's nearly identical defense states:

> Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.

42 U.S.C. § 7622(g).

> the OI investigations, the various written submittals and affidavits you and your attorneys have presented, the information you provided during your predecisional enforcement conference, and Florida Power Corporation's (FPC investigation results, *we have concluded that formal enforcement action against you is not warranted. This decision is based, in part, on the extent of FPC management's responsibility and culpability.* You are no doubt aware that the NRC has issued a significant sanction against FPC which included this violation. (Emphasis added).

RX 61 at 1-2 and RX 62 at 1-2. Complainants argue that "[I]f the management has been held responsible for this incident, then Complainants do not fall under the (g) exception, as they acted under the implied direction of their employer." Comp. Br. at 26.

We do not agree that the NRC's statements indicate the existence of implied authority in this case. In its letter to Fields, the NRC found that, "the unauthorized evolutions authorized and directed by you on September 4 and 5, 1994, constituted a violation of the conditions of your 10 CFR Part 55 license." RX 61 at 1[11]. After noting that the Complainants no longer possess an NRC operator's license (which FPC had revoked), the NRC stated that "[t]his experience should emphasize to you the importance of not taking unilateral action such as conducting unauthorized evolutions." *Id.* at 2. The NRC's use of the words "unilateral" and "unauthorized" in these circumstances to describe Complainants' actions negates any

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[11] There is nearly identical language in the NRC's letters to Weiss, RX 61, and Stewart, RX 62.

inference Complainants attempt to draw from the NRC letter quoted above that they had implied authority to conduct the evolutions. Furthermore, the NRC's Notice of Violation and Proposed Imposition of Civil Penalties faulted FPC for *"ineffective management oversight of* engineering, *operations*, and corrective action activities demonstrated by these violations." Ex. 58 at 3 (emphasis added). Complainants worked in operations, one of the units that FPC did not oversee effectively. For all these reasons, we reject the argument that the NRC letters demonstrate implied authority.

Complainants also cite other factors to support their theory of implied authority in this case. They note that the CR-3 plant was "in an almost constant state of alarm for two months upon the initial issuance of Curve 8 and hundreds of times subsequently, without filing any reports with the NRC." Comp. Br. at 28, citing C. at 53. Complainants argue that the routine triggering of the MUT tank annunciator alarm light was a past course of "management acquiescence and approval of similar conduct" which made it reasonable for them to believe that they had the authority to run the evolutions. Comp. Br. at 28.

The *Dotson* case is instructive concerning the allegation that management acquiescence constitutes implied authority. In that case, the employer, Anderson, was present in the room at the time that Dotson cheated on the examination. The ALJ reasoned, and we concurred:

> Anderson was present in the room when Butch left the answer sheet. Although Complainant testified that he believed that Anderson had

> paid Butch a bribe to set up the exam and provide the answers, he presented no corroboration of this allegation. Therefore, there is no evidence that Anderson knew what Butch was about to do upon beginning the examination. But even if Anderson did know of Butch's plans, there must still be some additional showing that he exerted some pressure, even indirectly, upon his employees to both remain in the room and participate in the cheating. Complainant has offered no evidence to this effect, even by his own testimony. Thus, the question becomes: was Anderson's mere presence in that room significant enough to amount to "direction" to Complainant to cheat on the exam? While there is undoubtedly some combination of facts which would yield a positive answer to this question, this fact pattern does not. Complainant's willing participation in the reading aloud of the correct answers clearly separates him from being either an innocent bystander or the victim of Anderson's coercion, however slight. While it would be understandable for Complainant to be reluctant to refuse to take the exam under the circumstances which existed on October 31, clearly his willingness to take part in the reading of the answers strongly indicates his free will participation in the cheating. Based upon the foregoing, I find Complainant did not act at the direction of his employer during the test-taking incident of October 31, 1994.

Dotson, ALJ Rec. Dec. and Ord., slip op. at 19.

In *Dotson* the employer's physical presence during the complainant's commission of the unlawful act did not constitute implied authority. In this case FPC's prior acquiescence in operating the plant under conditions that

triggered the MUT annunciator light likewise did not constitute implied authority. Moreover, FPC did not acquiesce in the precise behavior that caused a violation. Complainants conceded that no one had ever before raised the hydrogen pressure and the water to the maximum levels and rapidly drained the MUT of water, as they did. Fields Dep. at 59; Weiss Dep. at 179. We find no implied authority here on the basis of employer acquiescence in similar conduct.

Complainants' final argument concerning implied authority is based upon a duty under their operators' licenses to "protect the public and to assist in maintaining the plant at optimum safety levels." Comp. Br. at 28. They state that "[t]he only way management would further consider their concerns was if they had some hard data to highlight the problem." Id. at 29.

The NRC's letters to Complainants, however, explain that Complainants had at least two additional routes to raise their concerns about Curve 8:

> We recognize that your operating crew had raised questions concerning the conservatism of operating curve OP-103B, Curve 8 to your management and to an NRC inspector. We are concerned about the responses received from both your management and the NRC. Nevertheless, as a Shift Supervisor, we would have expected you to have *raised your concern higher within FPC. You could have raised the issue to either the Regional office or NRC headquarters.* Rather than pursue other avenues, you authorized your crew to perform a test that was not described in the Final Safety Analysis Report by using a procedure

> that had not been designed for data gathering purposes. (Emphasis added).

RX 61 at 2 (Fields and Weiss letters); *see* also RX 62 at 2 (Stewart letter).

The record demonstrates unequivocally that Complainants could have brought their concerns about Curve 8 to higher managers within FPC and to the NRC's regional office and headquarters. Given that other avenues were available to pursue Complainants' safety concern, the duty to protect the public did not constitute implied authority to conduct the evolutions.

Taken alone or together, the three theories of implied authority did not generate a genuine issue of material fact. We find, as a matter of law, that Complainants acted without any implied authority and that they acted "without direction from" FPC when they caused a violation.[12]

Section 211(g) Contains an Element of Willfulness

There is a considerable divergence of opinion among the parties and the Acting Assistant Secretary for Occupational Safety and Health, who filed a brief *amicus curiae*, concerning the meaning of the phrase, "deliberately causes a violation." Complainants contend that Section 211 (g) must be interpreted "to require that a complainant know his acts are illegal before he is stripped of his whistleblower protection." Comp. Br. at 12. Complainants

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[12] We adopt the ALJs rejection of the argument that Weiss and Stewart acted with direction of their employer because they were following the direction of Fields, their superior. R. D. and O. at 16-18.

also argue that the NRC's definition of "deliberate" should apply to a Section 211 (g) defense. Comp. Br. at 24-25. They state that under a NRC regulation, 50 C.F.R. § 50.5(c), deliberate misconduct is defined as " 'an intentional act or omission that the person knows' would result in a violation of law or regulation."[13] Id. at 24.

Respondent argues the opposite, that Section 211(g) may deprive complainants of whistleblower protection even if they do not know that their act causes a violation. The ALJ agreed with Respondent and the three part test he derived does not contain a willfulness element.[14]

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[13] Complainants refer to only a portion of the NRC's definition, however. The definition also includes "an intentional act or omission that the person knows . . . (2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor." 10 C.F.R. § 50.5(c). On two occasions when Complainants intentionally forced the MUT hydrogen pressure to the point that it triggered the annunciator alarm and allowed the alarm to remain on for some 35 to 43 minutes, they engaged in an intentional act that violated FPC's procedures and instructions. Thus, if we were to adopt the NRC's definition, as Complainants suggest, we would find that they engaged in deliberate misconduct as defined by the NRC regulation.

[14] The ALJ stated that he derived the three part test from the Secretary's analysis in *Jackson and Roskam v. Ketchikan Pulp Co.*, Case Nos. 93-WPC-007 and 93-WPC-008, Sec. Final Dec. and Ord., Mar. 4, 1996. *See* R. D. and O. at 15-16. In *Jackson and Roskam* the Secretary made no analysis of the analogous "deliberately causes a violation" language in the Federal Water Pollution Control Act (WPCA). The Secretary's entire discussion of the issue was contained in one sentence: "For purposes of my review of the ALJs decision on the merits, I have assumed, without deciding, that Jackson's attempt to dispose of a cable

The Acting Assistant Secretary argues that Section 211 (g) "applies only in situations where an employee willfully commits a nuclear safety violation," which would be satisfied either by knowledge that a violation will occur or by reckless disregard for whether a violation will occur. Asst. Sec. Br. at 4, 8. The Acting Assistant Secretary relies upon the common, dictionary meaning of the word "deliberate," the legislative history of the ERA's employee protection provision, and the fact that requiring an element of willfulness furthers the remedial nature of the ERA's whistleblower provision."[15]

Since the statute does not define the term, "deliberately," we will turn to the legislative history. The Acting Assistant Secretary finds support for defining the term to include the element of willfulness in the Senate Report:

> in order to avoid abuse of the protection afforded under the [ERA's employee protection provision], the committee has added a provision which would deny its applicability to any employee who, without direction from his employer, *deliberately violates or willfully contributes* to a violation of any standard, requirement, or regulation under the act. (Emphasis added).

S. Rep. No. 848, 95th Cong., 2d Sess. 30 (1978), reprinted in 1978 U.S.C.C.A.N. 7303, 7304. We find that the use of the term "willfully contributes to a violation" in the Senate Committee's report indicates that Congress intended

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into the water did not exclude him from protection under the WPCA. 33 U.S.C. § 1367(d)." *Jackson and Roskam*, slip op. 5 n.3.

[15] The Acting Assistant Secretary "offered no opinion as to whether the complainants here willfully violated a nuclear safety requirement." Asst. Sec. Br. at 4 n.4.

the words "deliberately causes" to have an element of willfulness.

As a remedial statute, the ERA should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived nuclear safety violations without fear of retaliation. *See generally, English v. General Elec. Co.*, 496 U.S. 72 (1990). *See also, Bechtel Constr. Co. v. Secretary of Labor*, 50 F. 3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws."). Since the ERA's remedial protection is to be interpreted broadly, any affirmative defenses logically should be interpreted narrowly so as to provide the act's protections to employees who work within the bounds of safety.

The ALJs interpretation of Section 211 (g) to include any action that is not inadvertent would, however, greatly expand the breadth of this affirmative defense. Such an interpretation could lead to unfortunate results in situations in which an employee acts deliberately (that is, not inadvertently), but innocently and without knowledge or reckless disregard that his or her action will cause a violation of the ERA or the Atomic Energy Act.

We are unaware of any decision in which a court has directly addressed the meaning of phrase, "deliberately causes a violation," in Section 211(g) or analogous whistleblower provisions. The sole Supreme Court case concerning Section 211 (g) does not shed light on its meaning. In *English*, 496 U.S. at 90, the Court held that a state law "claim for intentional inflection of emotional distress does not fall within the pre-empted field of

nuclear safety" or "conflict with any particular aspect of Section [211]."[16] The Court's cursory discussion of Section 211 (g) merely repeated the ALJ's finding on the subject, which neither the Secretary nor the lower courts discussed: "In the instant case, the ALJ found that petitioner had not deliberately committed a safety violation within the meaning of Section [211 (g)], . . . and neither the Secretary nor the lower courts have suggested otherwise." *Id.* at 88.

Both Complainants, Comp. Br. at 18-19, and FPC, Resp. Br. at 19-20, draw support for their interpretation of "deliberately causes a violation" from *Iowa Electric Light & Power Co. v. Local 204, Int'l Brotherhood of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987). There, the United States Court of Appeals for the Eighth Circuit affirmed a District Court ruling that overturned a labor arbitration award of reinstatement of an employee who had been discharged for "deliberately violating important federally-mandated safety regulations." *Id.* at 1425. The NRC had approved the discharge. *Id.* at 1426. The Eighth Circuit found that the employee "deliberately proceeded to defeat the interlock system, thereby committing a knowing violation of the safety rule. . . . " *Id.* at 1430. Although the court was not construing the meaning of Section 211 (g), we note that the Eighth Circuit equated the term "deliberately" with the element of knowledge. The court found that where the employee knows there is a rule,

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[16] After the *English* decision, Congress amended the ERA in the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-86, 106 Stat. 2776. The amendment renumbered former § 210 as § 211.

knows that the rule has an important purpose, and the employee violates the rule, the employee has acted deliberately. *Id.* We do not read *Iowa Electric* to mean that an employee must know the particular rule he is violating or secondly, that an employee who recklessly disregards safety rules is protected. In *Iowa Electric* the employee had actual knowledge of causing a safety violation and the issue of reckless disregard did not arise. *Id.* at 1429-1430. We do, however, rely on *Iowa Electric* to support our conclusion that an element of willfulness must be present in order to successfully raise a 211 (g) defense.

Including the element of willfulness in the meaning of "deliberately causes a violation" also is in keeping with Board precedent. In the previously discussed decision in *Dotson* where the affirmative defense was successfully raised, the complainant, Dotson, admitted "that he actively participated in reading off at least some of the answers" from a copy of the test that was left in the room where the EPA examination was administered. *Dotson*, ALJ Rec. Dec. and Ord., slip op. at 18. The ALJ found Dotson's "admission sufficient to determine that Complainant deliberately participated in an activity which violated the Act, whose provisions mandate the taking and passing of the CFC examination, presumably without cheating, in order to be allowed to continue working in the HVAC industry." *Id.* The discussion in *Dotson* shows that the complainant acted willfully, with either knowledge or reckless disregard, that his cheating would cause a violation of the Clean Air Act as he continued to work in refrigeration without having lawfully passed the certification exam. Slip op. at 18-19.

Section 211(g) Does Not Require Specific Intent

Complainants suggest that decisions of the Secretary construing Section 211(g) require a finding of the complainant's "specific intent" to cause a violation. Comp. Br. at 14. As an example, Complainants point to language in *Drew v. Jersey Central Power & Light Co.*, Case No. 81-ERA-3, ALJ (Rec.) Dec. and Ord., June 16, 1982, slip op. at 19, *adopted in* Sec. Final Dec. and Ord., Jan. 13, 1984: "There is no substantial evidence that Complainant deliberately caused any violation of the law. Drew did proceed to repair the defective weld valve in November 1978 without benefit of a prior written approval of his welding procedure for that weld, but he believed he was acting properly."

We do not find a specific intent requirement in *Drew*, where the ALJ emphasized that the failure to obtain prior written approval was merely a "technical procedural problem" and a "technical violation" of quality assurance rules. *Drew*, ALJ Dec., slip op. at 18. There was no indication of reckless behavior on Drew's part. At most, *Drew* stands for the proposition that where a technical and procedural regulatory violation is posited as the basis for a Section 211 (g) defense, the complainant's belief that he was not causing a violation is a factor to consider.

Nor do other, later decisions of the Secretary, convince us that for a successful Section 211(g) defense there must be a showing of the complainant's specific intent to cause a violation. In *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Final Dec. and Ord., Mar. 15, 1996, whatever the complainant's intentions in using sloppy practices to conduct laboratory tests, there was no showing

that his poor practices caused any statutory or regulatory violation, and therefore the defense based upon "deliberately causes a violation" necessarily failed.[17]

Similarly, in *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Dep. Sec. Dec. and Rem. Ord., Feb. 14, 1996, although the record established that violations of NRC regulations had occurred, the Deputy Secretary found that the complainant did not *cause* the violations: "Since I credit Creekmore's testimony that he neither knew about, or condoned, the premature issuance of good guy letters [clearing personnel for access to nuclear sites], I also agree with the ALJ's finding that Creekmore did not deliberately cause [the respondent] to violate the ERA." *Creekamore, slip* op. at 15.

Relying upon the legislative history and statutory purpose of the whistleblower provision and consistent with earlier decisions of the Secretary and this Board, we find that to establish a valid Section 211 (g) defense, a respondent must show that a complainant willfully or recklessly caused a violation of the ERA or the Atomic Energy Act, that is, that the complainant acted with knowledge or with reckless disregard of whether his or her act would cause a violation. Having defined the necessary showing for "deliberately causes a violation," we will discuss whether FPC made that showing in this case.

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[17] James arose under the WPCA, which contains a provision nearly identical to Section 211(g). *See* 33 U.S.C. § 3367(d).

Complainants Acted With Reckless Disregard, and Therefore Deliberately Caused a Violation

Complainants did not have actual knowledge that maximizing the MUT's hydrogen pressure and draining its water would cause a violation of the ERA or the Atomic Energy Act, as FPC's actions demonstrate. The company presented Curve 8 to the reactor operators as a conservative operating curve and there is no violation if such a curve is exceeded by a small amount. In addition, the annunciator light indicating that MUT hydrogen pressure was too high had been triggered often in the months prior to September 1994. Complainants suspected, but did not actually know, that Curve 8 was nonconservative. Indeed, it was only after the Complainants conducted the unauthorized evolutions that FPC managers learned definitively that Curve 8 was a design curve that should never be exceeded.

We would be more inclined to find an absence of recklessness if there were no other means to seek correction of Curve 8. As we noted above, however, Complainants could have brought their concerns to higher managers within FPC and to other levels of the NRC, both in the regional office and at the headquarters. An NRC resident inspector even invited Complainants to submit a formal allegation to the NRC concerning Curve 8.

Complainants contend that their actions "were appropriate, and consistent with the type encouraged by the respondent." Comp. Br. at 8. Nevertheless, they admitted in depositions that the specific evolutions they conducted had not been done in the past. And if they

sincerely believed their actions were consistent with procedures that FPC encouraged, they could easily have sought approval for the evolutions from higher management. They did not do so. *See* R. D. and O. at 16.

Complainants were well aware of the danger of operating the reactor with hydrogen pressure that was too high for the level of water in the MUT. Both Fields (Dep. p. 54, 78) and Weiss (Dep. p. 65-66) believed that catastrophe could arise if a loss of coolant accident occurred while the MUT's hydrogen pressure was too high.

While the NRC acknowledged that the Complainants' actions had the salutary effect of proving that Curve 8 was nonconservative, the agency also concluded that the salutary effect did not excuse the Complainants' risk taking:

> We further recognize that your operating crew contributed to the determination that the curve for maximum make-up tank pressure was in error and nonconservative and that the plant had been periodically operated outside its design basis. You also provided additional data that assisted in determining the extent to which operators were violating OP-103B, Curve 8, and the environment that existed at FPC. Nevertheless, we emphasize that the ends cannot justify the means. In this case, your actions demonstrated the validity of your concerns; in other instances such might not be the case.

RX 61 at 2 (Fields, Weiss letters); *see also* RX 62 at 2 (Stewart letter).

Nuclear power is "one of the most dangerous technologies man has invented." *Rose v. Secretary of Labor*, 800

F.2d 563, 565 (6th Cir. 1986) (Edwards, concurring). We find that, in light of the inherent danger involved in operating a nuclear plant and the existence of other avenues of redress for their suspicions about Curve 8, Complainants acted with reckless disregard of whether a violation of the ERA or the Atomic Energy Act would occur when they conducted the September 4 and 5 evolutions.

CONCLUSION

In light of the Complainants' reckless disregard for whether a violation would occur, the Complainants "deliberately caused a violation" of regulations promulgated under the Atomic Energy Act and the ERA. There is no genuine issue of material fact and FPC has established a valid Subsection 211 (g) defense as a matter of law. Accordingly, we accept the ALJ's recommendation and grant summary decision to FPC. The complaints are **DISMISSED**.

SO ORDERED.

/s/ David A. O'Brien
DAVID A. O'BRIEN
Chair

/s/ Karl J. Sandstrom
KARL J. SANDSTROM
Member

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

Case Name : ***David A. Fields, Robert P. Weiss, and Jack D. Stewart v. Florida Power Corporation***

ARB Case No. : **97-070**

ALJ Case No. : **96-ERA-22**

Document : **Final Decision and Order**

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Date: March 11, 1997

Case No.: 96-ERA-22

In the Matter of:

David A. Fields,
Robert P. Weiss, and
Jack D. Stewart
Complainants

v.

Florida Power Corporation
Respondent

RECOMMENDED DECISION & ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. Part 24. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (hereinafter "the NRC") and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The following abbreviations shall be used herein: "RX" for Exhibits attached to Respondent's

Motion for Summary Decision and "CX" for Exhibits attached to Complainants' Response to the Motion.

I. Summary of the Motion

There is currently pending before this Administrative Law Judge, Respondent's Motion for Summary Decision and/or Dismissal. Said Motion was submitted on or about November 25, 1996, and argues (1) that summary decision and/or dismissal of the entire complaints is proper based upon the §5851(g) affirmative defense, and/or (2) that summary decision and/or dismissal of part of the Fields and Weiss complaints is proper based upon the statute of limitations found at 42 U.S.C. §5851(b)(1). Complainants exercised their right to respond to the Motion by Complainants' Response to FPC's Motion for Summary Decision and/or Dismissal, dated December 5, 1996.[1] I have also considered Respondent's Reply to Complainants' Response to Motion for Summary Decision in reaching my determination of whether to grant the Motion.

I also granted the parties the benefit of appearing before this Judge to present oral argument on the Motion. The Motion hearing was conducted on December 19, 1996, in Tampa, Florida, and I have duly considered the

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[1] CX J, admitted at the December 12, 1996, Motion hearing, is Complainants' Amended Response to FPC's Motion for Summary Decision and/or Dismissal. The Amended Response was provided for the sole purpose of including citations of deposition transcripts previously omitted due to unavailability at the time the original response was filed.

persuasive arguments of both counsel which were then presented.

II. Summary of the Evidence

There are certain irrefutable facts established by the various supporting documents attached to Respondent's Motion for Summary Decision and Complainants' Response thereto. Among these documents, which I may properly rely upon in considering the pending Motion, are Complainants' deposition testimony, the Complainants' testimony before the Nuclear Regulatory Commission's Office of Investigations, and a number of letters from the NRC to the parties. I have found the Complainants' above-mentioned depositions and testimony of particular relevance because, for purposes of this Motion, I assume it to be truthful and in accordance with testimony they would have given in a hearing before this Administrative Law judge.

The irrefutable facts are these:

1. Respondent operates the CR-3 nuclear power plant located in Crystal River, Florida.

2. Complainants were reactor operators at the CR-3 nuclear plant. As reactor operators, the Complainants were licensed by the NRC and subject to regulatory and licensing requirements. Compl., ¶ 2. Complainant Fields occupied a position as the Nuclear Shift Supervisor, Complainant Weiss was the Assistant Shift Supervisor, and Complainant Stewart was one of two Chief Nuclear Operators.

3. The Make-up Tank (MUT) is one of the primary safety systems in the event of a loss of coolant accident (LOCA) at CR-3.

4. The Complainants were concerned that Curve 8, a curve which provides the pressure/level limits for the Make-up Tank, was invalid. The Complainants' concern(s) about Curve 8 were serious. **See** RX A, Fields Deposition (hereinafter Fields Depo.), p. 54, 78 (reason to believe catastrophic events could happen); RX B, Weiss Deposition (hereinafter Weiss Depo.), pp. 65-66 (Weiss believed there was a potential for catastrophe at the plant); RX ___,[2] Stewart Deposition (hereinafter Stewart Depo.), pp. 12-13 (Stewart states the potential for catastrophe was that crews were operating in a region where a LOCA could occur). **See Also** Compl., ¶¶ 59 and 61 (which set forth the Complainants' belief that they had a duty to verify a critical safety issue).

5. It is uncontroverted that on September 4 and 5, 1994, the Complainants each participated in adding hydrogen to the MUT and then rapidly reducing the water level. Compl. ¶¶ 62-63, 72-73; Fields Depo., pp. 109-110.

6. There was no plan to perform these acts prior to the beginning of the respective shifts. Fields Depo., pp. 151, 226, 419; Weiss Depo., pp. 226, 351-52; RX 53, NRC Office of Investigation (hereinafter "OI") interview of Complainant Weiss, December 1, 1994, p. 7; RX 54, NRC OI Interview of Complainant Fields, December 1, 1994, pp. 10-15.

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[2] This is an unlettered exhibit supplied to this Judge upon its availability from the transcriber.

7. It was Mark Van Sicklen's[3] idea to perform these acts on September 4, 1994. Weiss Depo., pp. 126, 158-59. Van Sicklen suggested the acts to Complainant Weiss and Weiss took the idea to Complainant Fields. Weiss Depo., pp. 126-27, 158-59.

8. In the middle of the shift on September 5th, Complainant Weiss and Van Sicklen suggested to Stewart that they should try the evolution again. Stewart Depo., p. 68.

9. These acts triggered a control room annunciator alarm, compl. ¶¶ 63 and 73; Fields Depo. pp. 97, 109-110, 159-169, 172-173; which remained in alarm on September 4th for forty-three (43) minutes, and on September 5th for thirty-five (35) minutes. Fields Depo., pp. 489-90; RX 32, Memorandum From D. Fields to G. Halnon Dated March 15, 1995, p. 3; RX 35, Memorandum from D. Fields to S. Ebneter Dated May 23, 1995, p. 3. **See Also** Weiss Depo., pp. 38, 43. A timeline of the September 5 acts was drafted by Complainants Fields and Weiss. **See** RX 14, Problem Report 94-0267, Dated September 7, 1994; RX 18, OP-103B Curve 8 Verification 9/5/94; RX 29, LER 94-009-00, Dated December, 1994; RX 52, "Timeline MUT lvl decrease 9/5/94."

10. It is a fact that the only reason the Complainants conducted the acts was to challenge the validity of Curve 8. Fields Depo., pp. 78, 85, 114; Weiss Depo., pp. 177, 178; Stewart Depo., pp. 55, 56, 76. There were no operational

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[3] Mr. Van Sicklen is not a Complainant in the present action. He was, however, a participant in the actions performed. At the relevant time, Mr. Van Sicklen was employed as a Chief Nuclear operator at CR-3.

reasons for the acts. Fields Depo., p. 77; Weiss Depo., p. 76; Stewart Depo., p. 76.[4] The intent was to give Engineering data that would convince them that there was a problem with the Curve. Weiss Depo., p. 98; Fields Depo., pp. 78, 86; Stewart Depo., pp. 12, 164-65.

11. Weiss states the decision to challenge Curve 8 on the 4th and the 5th was a deliberate and intentional decision on his part. Weiss Depo., p. 184.

12. Stewart admits that it is a fact that if a crew deliberately takes a plant beyond any of the parameters of Curve 8, **i.e.**, the 55 inch low and 86 inch high, that a test procedure is needed. Stewart Depo., p. 21.

13. Complainants did not consult with the CR-3 Engineering Department before conducting their acts, either on the 4th or the 5th, Weiss Depo., p. 100, nor did they consult management or the Shift Manager regarding their acts, Fields Depo., pp. 80, 418-25; Weiss Depo., pp. 83-84, 88-89; RX C, Affidavit of Gregory Halnon, para. 5; RX D, Affidavit: of Bruce Hickle, para. 4; nor did they consult the NRC. Fields Depo., p. 52; Weiss Depo., p. 253. Stewart admits that neither Complainant Fields nor Complainant Weiss told him that they had talked with Greg Halnon; Bruce Hickle, Director of Nuclear Plant Operations; or Dr. P.M. Beard, Senior Vice-President of Nuclear Operations, about the tests. Stewart Depo., p. 123.

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[4] There was no operational reason to add hydrogen. Fields Depo., p. 77; Stewart Depo., p. 76. Stewart states the "operational reason" that the crew lowered the level from 86 to 55 inches was to find out if Curve 8 was valid or not. Stewart Depo., p. 77. **See Also** Fields Depo., p. 78. I find this to be a circuitous statement.

14. Weiss states he did not tell a shift supervisor of the actions because he was using routine procedure to check it out. Weiss Depo., p. 27. Weiss calls the steps of the process routine, a series of routinely performed evolutions. Weiss Depo., pp. 72, 128, 352. Weiss believed he was fully authorized to do what he did. Weiss Depo., p. 71. Fields explains that he did not consult with the NRC because "what we planned to do was clearly within our authority to perform," Fields Depo., p. 52, **i.e.**, it was within OP-402, a pre-approved procedure. Fields Depo., pp. 65, 153. **See Also** RX 32, **supra** para. 9.

15. Weiss admits, however, that it was not routine to call the auxiliary building operator and tell him to dress out, Weiss Depo., p. 72; nor was it routine to add hydrogen at a high level and do an entire bleed down to the low level while the plant was in alarm. Weiss Depo., p. 73. **See Also** Stewart Depo., pp. 28-29, 37, 46-47 (stating the non-routine nature of the acts performed).

16. Complainant Stewart does not know if it is routine to add hydrogen at the high level and do a bleed to the low level, although he states that he had never done it before. Stewart Depo., 29. During Complainant Stewart's OI interview, the investigator asked if it was "a routine evolution or routinely [sic] to post someone at the makeup tank at that area in order to vent the makeup tank during a hydrogen fill operation?" Stewart Depo., p. 115, (**Quoting** RX 55, Stewart's OI Interview of December 1, 1994, p. 11). Stewart answered "No. We don't anticipate challenging any curves." Stewart Depo., p. 115. Complainant Stewart admits it is not a routine conversation to discuss what would happen if a LOCA came in. Stewart Depo., p. 28.

17. Complainants did not know, at the time of their acts, that Curve 8 was a design basis. Stewart Depo., pp. 63, 149; RX 32, **supra** para. 9, at p. 3; RX 35, **supra** para. 9, at p. 3. Complainants have, however, stated they suspected Curve 8 was nonconservative. Stewart Depo., p. 148; RX 35, **supra** para. 9, at p. 5.

18. Complainants did not know, at the time of their acts, what the definition of a test was. Stewart Depo., p. 93; CX 66, NRC Investigative Interview of R. Weiss, August 31, 1995, at p. 37.

19. An NRC OI Report states Respondent had apparently violated NRC regulations by failing to exercise the appropriate management oversight and control in an attempt to preclude intentional violation of plant procedures. RX 59, Letter From NRC to P.M. Beard, Dated July 7, 1995, at p. 2.

20. An NRC Notice of Violation and Imposition of Civil Penalties, dated on or about July 10, 1996, states that the NRC has determined Respondent has committed a number of significant violations of NRC requirements. RX 58, Letter From NRC to P.M. Beard Dated July 19, 1996. Among these violations was a violation for routinely exceeding operating limits associated with operating procedure OP-103B, Curve 8, and a violation in which a crew of licensed operators conducted unauthorized tests on two separate occasions in an effort to resolve safety issues that had not been promptly addressed by Respondent. RX 58, **supra,** at p. 2. In regards to the latter action, the NRC Description of Violations also states that although "this violation resulted from the independent actions of a single shift operating crew, FPC as the employer of the

operators involved bears responsibility for their actions as employees." RX 58, **supra,** at Enclosure 1, p. 2.

21. A February 13, 1996, Report of Investigation by the NRC OI, states its conclusion as follows: "the shift supervisor, assistant shift supervisor, and two chief operators on the midnight shift of September 4 and 5, 1994, deliberately conducted an evolution, not required by plant conditions, for the specific purpose of gathering data. Furthermore, when the allowable makeup tank overpressure was exceeded, the operators deliberately delayed taking appropriate action to reduce makeup tank overpressure while gathering that data." RX 64, NRC OI Report of Investigation Dated February 13 1996, Synopsis, at p. 1.

22. The NRC determination of violation letter, sent to Complainant Fields states

> As a senior reactor operator, you were licensed to direct the activities of other operators. The operating crew that you supervised failed to meet the standards for operators of a nuclear power plant. We conclude, based on the information developed during the inspections and investigations and the information you provided during the conference, that the unauthorized evolutions authorized and directed by you on September 4 and 5, 1994, constituted a violation of the conditions of your 10 C.F.R. Part 55 license.
>
> Performance of an unauthorized evolution affecting safety systems is a significant violation. However, after considering the results of the OI investigations, the various written submittal and affidavits you and your attorneys

have presented, the information you provided during your predecisional enforcement conference, and Florida Power Corporation's (FPC) investigation results, we have concluded that formal enforcement action against you is not warranted. This decision is based, in part, on the extent of FPC management's responsibility and culpability. . . .

. . . . Nevertheless, as a Shift Supervisor, we would have expected you to have raised your concern higher within FPC. You could have raised the issue to either the Regional Office or NRC Headquarters. Rather than pursue other avenues, you authorized your crew to perform a test that was not described in the Final Safety Analysis Report by using a procedure that had not been designed for data gathering purposes. We further recognize that your operating crew contributed to the determination that the curve for maximum make-up tank pressure was in error and nonconservative and that the plant had been periodically operated outside its design basis. You also provided additional data that assisted in determining the extent to which operators were violating OP-103B, Curve 8, and the environment that existed at FPC. Nevertheless, we emphasize that the ends cannot justify the means. . . .

You no longer possess an NRC operator's license. This experience should emphasize to you the importance of not taking unilateral action such as conducting unauthorized evolutions.

RX 61, Letter From NRC to D. Fields, Dated July 10, 1996.[5]

23. The NRC determination of violation letter directed to Complainant Stewart states

> As a reactor operator, you were licensed to direct the controls of the Crystal River Nuclear Power Plant. You were specifically involved in the planning and implementation of the unauthorized evolutions conducted on September 4 and 5, 1994. We conclude, based on the information developed during the inspections and investigations and the information you provided during the conference, that unauthorized evolutions conducted by you and your crew on September 4 and 5, 1994, constituted a violation of Commission requirements.
>
> Performance of an unauthorized evolution affecting safety systems is a significant violation. However, after considering the results of the OI investigations, the various written submittal and affidavits you and your attorneys have presented, the information you provided during your predecisional enforcement conference, and Florida Power Corporation's (FPC) investigation results, we have concluded that formal enforcement action against you is not warranted. This decision is based, in part, on the extent of FPC management's responsibility and culpability. . . .

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[5] Also attached as Exhibit 61, is the NRC letter to Complainant Weiss, which is, for all intents and purposes, virtually identical to Complainant Fields' letter.

> . . . . Nevertheless, as a licensed reactor operator in the position of Chief Nuclear Operator, we would have expected you to have raised your concern higher within FPC. You could have raised the issue to either the Regional office or NRC Headquarters. Rather than pursue other avenues, your crew performed a test that was not described in the Final Safety Analysis Report by using a procedure that had not been designed for data gathering purposes. We further recognize that your operating crew contributed to the determination that the curve for maximum make-up tank pressure was in error and nonconservative and that the plant had been periodically operated outside its design basis. You also provided additional data that assisted in determining the extent to which operators were violating OP-103B, Curve 8, and the environment that existed at FPC. Nevertheless, we emphasize that the ends cannot justify the means. . . .
>
> You no longer possess an NRC operator's license. Should you apply for a license in the future, this experience should emphasize to you the importance of raising issues to higher management and the NRC rather than taking unilateral action such as conducting unauthorized evolutions.

RX 62, Letter From NRC to J. Stewart, Dated July 10, 1996.

24. In response to these letters, the attorney representing Complainants Fields and Weiss wrote the NRC that his clients were "gratified to see that the NRC's final ruling on the 'MUT Issue' concluded that 'enforcement is not warranted' and no Notice of violation is being issued. The plant operators believe that the blame for the episode

is appropriately being placed squarely on the shoulders of the Florida Power Corporation." CX 67, Letter From R. Hendrix to NRC, Dated July 19, 1996, at p. 1. The attorney continues, however, to express dissatisfaction with the language in regards to "unauthorized tests" and the operators' failure to meet standards for nuclear power plant operators. Accordingly, the attorney requested a hearing to appeal the NRC findings. CX 67, **supra.** A similar letter was addressed to the NRC on Complainant Stewart's behalf. CX 67, **supra.**

25. The NRC's response to both letters stated that a request for appeal is premature, given the fact that the NRC had not yet taken any enforcement action directly against the Complainants and that the NRC would not rescind its letter describing findings of unauthorized tests. **See** CX 67, Letter From NRC to R. Hendrix, Dated August 23, 1996; Letter From NRC to B. Morris Dated September 9, 1996.

III. Conclusions of Law

The resolution of Respondent's Motion for Summary Decision and/or Dismissal hinges upon the interpretation of §5851(g) of the Energy Reorganization Act.[6] That Section provides

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[6] Although Respondent has also moved for partial summary decision and/or dismissal on the Fields and Weiss complaints based upon the applicable statute of limitations, this Judge does not reach a determination of that issue because of the §5851(g) defense.

> Subsection (a) of this section shall not apply with respect to any employee **who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954** . . . 42 U.S.C. §5851(g). (Emphasis added)

The section serves as a bar to a complainant's ERA claim once it is determined that he or she has caused a deliberate violation of the ERA or AEA. **See English v. General Elec. Co.,** 683 F.Supp. 1006, 1014 (E.D.N.C. 1988), **aff'd on other grounds,** 871 F.2d 22 (4th Cir. 1989), **rev'd on other grounds,** 496 U.S. 72 (1990); **Dotson v. Anderson Heating and Cooling, Inc.,** 95-CAA-11 (Sec'y July 17, 1996), (ALJ October 2, 1995). The legislative history reveals that "in order to avoid abuse of the protection afforded under [the ERA], the committee has added a provision which would deny its applicability to any employee who, without direction from his employer, deliberately violates or willfully contributes to a violation of any standard, requirement, or regulation under the act." S. Rep. No. 848, 95th Cong., 2d Sess. 30 (1978), **reprinted in** 1978 U.S.C.C.A.N. 7303, 7304. The meaning of the section is rendered unclear inasmuch as the statute does not include definitions of the pertinent terms.

On the one hand, Respondent argues the section should be interpreted to require only that Complainants deliberately committed an act which resulted in a violation of the relevant law. According to this interpretation, Respondent argues, it would be irrelevant whether Complainants knew that the act they deliberately committed was illegal.

On the other hand, Complainants argue the statutory language must he interpreted to require a complainant know[7] his acts are illegal. Complainants, noting that there is "no authority that a mere violation of nuclear safety regulatory regulations justifies discriminatory conduct," Complainants' Response, p. 8, would have this Administrative Law Judge apply an NRC regulation in interpreting §5851(g).[8] As Complainants summarize in their response to Respondent's Motion, the deliberate misconduct standard of the NRC regulation requires an intentional act or omission that the person knows constitutes a violation of nuclear regulatory requirements. Complainants' Response, p. 9.

It is a basic tenet of statutory construction that if statutory language is clear and unambiguous on its face then it must be given its plain meaning and no resort to the underlying legislative history is appropriate. **See Generally Kansas Gas & Elec. Co. v. Brock,** 780 F.2d 1505, 1510 (10th Cir. 1985), **cert. denied,** 478 U.S. 1011, 106 S. Ct. 3311. As has been previously mentioned, the

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[7] Whether Complainants intend to suggest an actual or constructive knowledge standard is irrelevant because, as is more fully discussed below, I find that the statute does not require a complainant have knowledge of the illegality of his action(s).

[8] The NRC regulation can be found at 10 C.F.R. 50.5(c). Pursuant to this regulation, certain persons, as defined at 50.5(a), in the nuclear industry are subject to enforcement action in accordance with 10 C.F.R. Part 2, subpart B, for engaging in deliberate misconduct that causes a violation of law or NRC regulation. Deliberate misconduct is defined as "an intentional act or omission that the persons knows" would cause or constitutes a violation of law or regulation. 10 C.F.R. 50.5(c).

statute at issue does not define the terms "deliberately causes." Accordingly, the anatomy of the statute itself, legislative history, and underlying policy will aid in the resolution of the issue. **See Generally Kansas Gas & Elec. Co.,** 780 F.2d at 1511.

42 U.S.C. §5851, **et seq.,** was designed as "an administrative procedure" to "offer[ ] protection to employees who believe they have been discriminated against as a result of the fact that they have testified, given evidence or brought suit . . . " under the AEA or the ERA. **English,** 683 F.Supp. at 1013 (Citation Omitted). "Employee protection was the paramount congressional intent." **Id.** The purpose of the statute is to avoid a nuclear catastrophe by encouraging employees in the nuclear power industry to report perceived safety violations in good faith without fear of retribution or retaliation. **See, e.g., Rose v. Secretary of Labor,** 800 F.2d 563, 565 (6th Cir. 1986). It has also been opined, however, that there is "a well defined and dominant national policy requiring strict adherence to nuclear safety rules. . . . Nothing could he plainer than the public interest in the safe operation of nuclear power plants that underlies [the] panoply of federal regulations." **Iowa Elec. Light & Power v. Local Union 204,** 834 F.2d 1424, 1427-28 (8th Cir. 1987).

To compound the challenge of interpreting the statute, the case law interpreting §5851(g) is sparse at best. Most of the cases which could be found concerned issues of preemption, **see English, supra** p. 9; a few cases mentioned the section in only a passing reference, **see Kansas Gas & Elec. Co.,** 780 F.2d at 1510; another case resolved the issue by finding that the section did not bar the complaint because it was found that complainant neither

knew about nor condoned the illegal act, **Creekmore v. ABB Power Sys. Energy Services, Inc.**, Decision & Remand Order (Sec'y February 14, 1996) (remanded on other grounds); and, finally, another case held that complainant's admission of reading provided answers out loud during an EPA mandated examination was sufficient to determine that complainant deliberately participated in an activity which violated the Act. **See Dotson, supra** p. 10 (adopting the ALJ's Recommended Decision Dismissing Complaint October 2, 1995).

There are a few cases wherein §5851(g) was discussed in an Administrative Law Judge's Recommended Decision & Order. The discussions, however, were rendered dicta because the subsequent Final Order by the Secretary dismissed the complaints on timeliness grounds. **See Hadden v. Georgia Power Co.**, 89-ERA-21 (Sec'y February 9, 1994), (ALJ May 21, 1990); **McKinney v. Tennessee Valley Auth.**, 92-ERA-22 (Sec'y November 16, 1993), (ALJ March 17, 1992); **English v. General Elec. Co.**, 85-ERA-2 (Sec'y February 13, 1992), (ALJ August 1, 1985). I am unable to give the recommendations rendered by the ALJs in the above-cited cases any precedential value because the Secretary, the body with the power to issue final decisions in these cases, has rendered a decision on other grounds.

Complainant has accurately pointed out that there exists provisions similar to 42 U.S.C. §5851(g) in a number of other Federal statutes. **See** Complainants' Motion, n.18 (**Citing** 15 U.S.C. §2622(e) (Toxic Substances Control Act); 33 U.S.C. §1367(d) (Water Pollution Control Act); 42 U.S.C. §300j-9(i)(6) (Safe Drinking Water Act); 42 U.S.C. §6971(d) (Solid Waste Disposal Act); and 42

U.S.C. §7622(g) (Clean Air Act)). The Senate Report accompanying the ERA provision that was ultimately enacted notes that the ERA provision is substantially identical to the provisions in the Clean Air Act and the Federal Water Pollution Control Act. **See** S. Rep. No. 848, 95th Cong., 2d Sess. 30 (1978), **reprinted in** 1978 U.S.C.C.A.N. 7303. I have attempted to locate precedent interpreting the analogous provision in either or both of these statutes and have been similarly met with discouraging results. **See Jackson and Roskam v. Ketchikan Pulp Co.,** 93-WPC-7 and 8, at n.3 (Sec'y March 3, 1996), (ALJ March 10, 1994) (stating the Secretary assumes, "without deciding, that [Complainant's] attempt to dispose of a cable into the water did not exclude him from protection under the WPCA"); **Pooler v. Snohomish County Airport,** 87-TSC-1, at n.14 (Sec'y February 14, 1994), (ALJ March 10, 1988) (in which the Secretary declined to address the arguments pertaining to §2622(e) because it was not relied upon in the ALJ's final analysis).

Respondent's argument is premised upon the Secretary's adoption of the ALJ's decision in **Drew v. Jersey Central Power and Light Co.,** 81-ERA-3 (Sec'y January 13, 1984), (ALJ June 16, 1982). In **Drew,** the respondent was attempting to bar Complainant's claim by invoking §5851(g). The Secretary held that there was no substantial evidence that Complainant deliberately caused any violation of any requirement of the law. The Secretary stated that on both occasions of the illegal acts,[9] Complainant

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[9] The acts occurred on two occasions: (1) Complainant repaired a defective valve without a prior written approval of the welding procedure, and (2) Complainant retained an original copy of an internal non-conformance report.

believed he was acting properly. I am unable to discern the Secretary's reasoning from the text of the decision itself, which disposes of the §5851(g) issue in a short one paragraph. The [illegible] case, therefore, provides me little guidance in the present task.

In support of Complainants' argument is a Court of Appeals decision from the Eighth Circuit. **See Iowa Elec. Light & Power,** 834 F.2d 1424. The issue in the **Iowa Electric** case was whether the respondent would have to reinstate a complainant who was discharged for deliberately violating important federally mandated safety regulations. The Court stated "we are not concerned with what [Complainant] says he did not know about the details [of the federal regulation]. It is enough that he did know that he was short circuiting an important safety system required by the federal government as a measure to protect the public. . . . " **Id.** at 1426. It was only in considering whether the violation was excusable, so as to warrant reinstatement, that the Court noted the violation was serious and knowing. **Id.** at 1429.[10]

Cognizant of this precedent, legislative history, and public policies, I cannot adopt Complainants' interpretation of §5851(g). To do so would render the section virtually ineffectual because there is the potential that every complainant would deny knowledge that his deliberately

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[10] "The Court found the violation was serious and knowing by inferring complainant knew the safety rule and that the safety feature was important. After having been denied permission, complainant deliberately proceeded to defeat that safety system, thereby committing a knowing violation of the safety rule. **Iowa Elec. Light & Power,** 834 F.2d at 1429-30.

performed acts were violative of an ERA and/or AEA provision. Such an interpretation would be in contravention of the purpose of §5851(g), which is to "avoid abuse of the protection afforded," **supra** p. 10, because the protection of section (g) would depend greatly upon the veracity of the complainant, the person whom the legislature wanted to restrain from abusing the statute.

Moreover, such an interpretation would create a standard whereby complainants would be expected to make a determination, prior to doing an act, that the act would be violative of the ERA and/or AEA. These violations are adjudicated by this Office and/or determined by the NRC through investigations and hearings. It is, in fact, the rare case where an actor commits a violation knowing it to be a violation. It is, in fact, the common case where an act is committed that is later discovered to be a violation.

This Judge finds Complainants' argument that I should construe the "deliberately causes" language in §5851(g) similarly to the deliberate misconduct language in 10 C.F.R. 50.5(c) to be without merit. My reasons for this are twofold. First, the language of the regulation specifically states it is supplied "for purposes of paragraph (a)(1) of" that section. Secondly, there is no similar definition in the Employee Protection section of the NRC regulations. **See Generally** 10 C.F.R. 50.7. The language of the NRC's Employee Protection regulation actually mirrors the language of the ERA. **See** 10 C.F.R. 50.7(a)(3). Furthermore, I see no reason to apply the definition of deliberate misconduct to the definition of deliberately causes because these are two distinct concepts.

My interpretation of the statute is further supported by considering the common usage of the words which are the center of the present dispute. A respondent must establish complainant deliberately caused a violation, **i.e.**, a respondent must establish a complainant, fully aware of what he or she is doing and with careful and unhurried consideration, **see Webster's Dictionary,** brought into existence, **id.**, a violation of the ERA or AEA. It is by substituting these common definitions for the statutory words "deliberately causes," that it becomes even more evident that there is no requirement that respondent show complainant had "knowledge" that the act would be illegal. **See Generally Dysert v. Florida Power Corp.,** 93-ERA-21 (Sec'y August 7, 1995) (wherein the Secretary looked, in part, to the common usage of the word "demonstrate" to resolve an issue of statutory interpretation).

This is not to say that respondents in general should have an easy case of making out the §5851(g) affirmative defense. **See Jackson and Roskam, supra** p. 13, (describing 33 U.S.C. §1367(d) as an affirmative defense); **Hadden, supra** p. 13, (describing 42 U.S.C. §5851(g) as an affirmative defense).[11] Applying the Secretary's analysis in **Jackson and Roskam** to the circumstances of this case, Respondent would have to prove (1) that the act was done without direction from the employer, (2) that Complainants deliberately did an act, and (3) that the act

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[11] The ALJ's recommendation in **Hadden** describes §5851(g) as an affirmative defense. As previously mentioned, the ALJ's decision is deprived of its precedential value because of the Secretary's subsequent decision dismissing on timeliness grounds. It is cited on this point only for its persuasiveness.

caused a violation of ERA or AEA requirements. **See Generally Jackson and Roskam, supra** p. 13.

Respondent Florida Power Corporation has met its burden of establishing the §5851(g) affirmative defense in this case. Furthermore, Respondent is entitled to have this claim disposed of by summary decision because all facts relevant to this defense have been conclusively established. As is more fully discussed below, there exists no genuine issue of material fact which would prevent an entry of dismissal on the basis that Complainants deliberately caused a violation of law.

I will now apply this law to the irrefutable facts of the case at hand. Complainants did not consult with the CR-3 Engineering Department before conducting their acts, either on the 4th or the 5th, Weiss Depo., p. 10; nor did they consult management or the Shift Manager regarding their acts, Fields Depo., pp. 52, 80, 418-25; Weiss Depo., pp. 83-84, 88-89, 253; RX C, Affidavit of Gregory Halnon, para. 5; RX D, Affidavit of Bruce Hickle, para. 4; nor did they consult the NRC, Weiss Depo., p. 253; CX 66, NRC Investigative Interview of R. Weiss, August 31, 1995, p. 19. Complainant Fields does not argue that he performed these acts at the direction of management. Complainant Stewart, however, has stated that he spoke with his management, referring to Complainant Fields, the nights of September 4 and 5. Stewart Depo., pp. 25, 27, 122. Complainant Stewart describes himself as a "lowly guy," who believed Complainants Fields and Weiss were working with the Manager of Nuclear Operations, Greg Halnon, all along to resolve the problem presented by Curve 8. Stewart Depo., p. 121-22. Stewart

states that if Complainant Fields ordered him to do something and Stewart did not see it as an undue risk to the plant, he would do it because Fields had the authority to order him to do it. Stewart Depo., pp. 9-10, 36.

Of course, Complainant Stewart admits that neither Complainant Fields nor Complainant Weiss told him that they had talked with Greg Halnon; Bruce Hickle, Director of Nuclear Plant Operations; or Dr. P.M. Beard, Senior Vice-President of Nuclear Operations, about the tests. Stewart Depo., p. 123. Stewart describes the issue of the validity of Curve 8 as being closed out by management if the crew did not come up with some information to feed back to engineering. Stewart Depo., pp. 12, 164-65. Furthermore, Stewart states that Van Sicklen was one of the principal engineers of the curve challenge on the 4th. Stewart Depo., pp. 39-40. In fact, Stewart describes that sometime in the middle of the shift on the 5th, Fields, Weiss and Van Sicklen suggested trying the evolution again.[12] Stewart Depo., pp. 68-69. Stewart admits that if no procedural guidance allowed the crew to perform the

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[12] Stewart initially attributes the idea to again conduct the evolution on the 5th to Weiss and Van Sicklen. He later includes Fields in the group who originated the idea. Of course, during his OI interview, Stewart seems to indicate that the idea to conduct the evolution was more of a group decision. **See** RX 55, NRC 01 Interview of J. Stewart, December 1, 1994, p. 7 ("And we talked about the whole situation, said, well, what can we do that could bring to light what we're doing, you know, what our concerns are here. And it was suggested that we put the make-up tank on the curve"). For purposes of this Motion, I must construe this evidence in the light most favorable to Complainants. Therefore, I will assume the idea to re-run the evolution on the 5th came, in part, from Complainant Fields.

acts, it would have been necessary to notify management. Stewart Depo., p. 27.

This Administrative Law Judge, assuming all facts in the light most favorable to Complainant Stewart, still cannot find that he acted at the direction of his Employer as is contemplated by §5851(g). At the very least, Stewart knew the idea of challenging Curve 8 originated with Van Sicklen, who proposed it to Complainants Fields and Weiss. At the very least, Stewart knew the proposed acts originated with and remained within the knowledge of his fellow crew. Given this minimal knowledge and the fact that the proposed acts were to be performed on a primary safety mechanism, Complainant Stewart should realistically have seen the undue risk to the plant and sought management approval.

The outcome of Complainant Stewart's claim that he performed these acts at the direction of management may have been different if there were some evidence to the effect that Stewart believed Fields was taking direction from upper management. From the testimony of Stewart himself, however, it is clear that he was aware that the original idea to challenge the Curve came from Van Sicklen. In addition, it is only logical to conclude that Stewart was aware that the evolutions were not directed by management based on his testimony that the evolutions were necessary to produce data that would prevent management from closing out the issue of Curve 8.

Any similar argument advanced by Complainant Weiss is similarly insufficient for this Administrative Law Judge to conclude that Complainant Weiss was acting at the direction of his employer. In his OI interview, Weiss

states Van Sicklen came to him when the Curve 8 issue appeared to be getting closed out and asked Weiss to perform acts to verify the curve. **See** RX 53, p. 7. **See Also** Weiss Depo., p. 127. Weiss then discussed the idea with Fields. Weiss also states that the attempts to resolve the concerns about Curve 8 were running "into a brick wall" and that when "nothing happens, then someone's got to do something at that point." CX 66, **supra** para. 18, at p. 49.

This Administrative Law Judge, having determined that the acts performed by Complainants on the 4th and 5th were not directed by the Respondent, will now determine whether Complainants' acts were deliberate. Complainant Weiss himself succinctly stated during deposition that the decision to challenge Curve 8 was a deliberate and intentional decision. Each Complainant has affirmed, under oath, that the reason they conducted the acts was to challenge the validity of Curve 8. The Complainants allowed the annunciator alarm to remain in alarm status for extended periods of time in order to collect the data they perceived they needed to convince Engineering of the invalidity of Curve 8. The evidence before this Administrative Law Judge concerning the issue of Complainants' deliberateness is overwhelming and I will simply refer to the Summary of the Evidence, paras. 4, 6, 7, 8, and 10.

Finally, it is necessary to determine whether the deliberate actions caused a violation of the ERA or AEA. Respondent argues "the undisputed facts establish that the Complainants unquestionably violated the terms of their operator licenses by intentionally performing two unauthorized tests on the MUT." Respondent's Motion, p.

26. The facts upon which Respondent relies in presenting this argument are the NRC Notice of Violation issued to Respondent together with its enclosures, RX 58; the NRC findings, RX 61 and 62; and the NRC OI findings, RX 63 and 64. Respondent suggests "because the NRC has the sole authority to make such determinations, they are binding upon and cannot be second-guessed or excused by another tribunal, including the Department of Labor." Respondent's Motion, p. 28, n.24. I call this quotation a "suggestion," rather than an argument, because it is made as a passing statement in a footnote and is not supported by any legal authority.

Complainants, of course, argue that whatever the NRC findings may constitute, they do not constitute a finding of deliberate misconduct as defined in 10 C.F.R. 50.5(c), which is the standard Complainants wish to have incorporated into §5851(g). In addition, Complainants stress the fact that this ALJ is not bound by the NRC's conclusions. Complainants' Response, p. 15, n.8 (**Citing Creekmore,** 93-ERA-24 (Dep. Sec'y February 14, 1996), p. 4 (in which the Deputy Secretary opined "the [NRC] investigation report is a relevant public document of a Federal agency and I will take notice of it")). In **Creekmore,** the Deputy Secretary reviewed the evidence of record and concluded that he disagreed with the findings of the NRC.

The gravamen of Complainants' argument on this point is that while Complainants may have violated NRC regulations, they did so unknowingly. This is supported by Complainant Fields' written statements which state, "If I had realized that the curve represented a design basis, I would not have authorized performance of the

test. . . . Although I regret performing the test and causing a violation, I do not believe that this one event should be the downfall of a fifteen year career." RX 32, **supra** para. 9, at p. 3. Complainant Fields also writes "Control room personnel performed an evolution in which we unknowingly violated a design basis curve without the proper procedural review." RX 28, Interoffice Correspondence From D. Fields to J.A. Frijouf, Dated December 6, 1994, p. 2.

In the case **sub judice,** I have arrived at the conclusion that the uncontroverted facts, as established by Complainants' own testimony and various documents, support the NRC's determination in regards to each Complainant. Accordingly, I have considered the NRC letters and reports and am persuaded by the findings therein.

This Judge applauds the Complainants for their keen analysis which led to the discovery of a serious safety issue. I cannot, however, condone the method by which they chose to accumulate supporting data for their concern(s). As the NRC has stated, the ends simply do not justify the means. Therefore, I somewhat regretfully find that the evidence in this case conclusively establishes those facts necessary to a 42 U.S.C. §5851(g) defense.

In conclusion, it is necessary to determine whether this defense bars all or part of the Complainants' complaints. Complainant Fields filed a fifty-nine (59) page complaint in this matter, excluding supporting materials. Both Complainants Weiss and Stewart filed four (4) page complaints which incorporate the information and documentation supplied by the Fields complaint.

The Complainants allege Respondent retaliated against them as a direct result of their disclosure of violations of the Act, violations of NRC rules and regulations, and their initiation, assistance, and participation in actions which had commenced, or caused to be commenced, a proceeding under the Act. **See** Fields Compl., ¶ 7; Weiss Compl., ¶ 7; Stewart Compl., ¶ 7. Complainants have argued that their complaints state a cause for protected activity distinct from and unrelated to the September 4th and 5th tests.[13] Specifically, Complainant Fields states he engaged in protected activity which cannot be barred by the §5851(g) defense when he reported serious safety concerns with regards to directives issued by Respondent's management to maintain critical reactor support and emergency systems, when he insisted that Respondent not present misinformation on the Licensee Event Report, and when he attempted to avoid Respondent placing blame on the operators and the reporting of management's directives to operate on or near Curve 8. **See** Complainants Motion for Reconsideration and Clarification, ¶¶ 2 (Citing Compl., ¶ 3), 12, 16.[14] Accordingly, Complainants argue that the §5851(g) defense does not operate to bar their entire complaints.

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[13] **See** Complainant Fields' Motion for Reconsideration and Clarification, ¶ 1; Complainants Weiss and Stewart Motion for Reconsideration and Clarification, ¶ 2. These Motions, although prematurely filed, have been considered by this Administrative Law Judge.

[14] Although Complainants Weiss and Stewart are not as clear as to their allegation of other protected activity, their Motion for Reconsideration and Clarification might be read to encompass the same acts as those enumerated by Complainant Fields.

Assuming, as this Judge must, that Complainants actually engaged in all of these actions,[15] it is not possible to allow any part of their complaints to survive. Section 5851(g) acts as a complete bar to subsection (a) relief. **See supra,** p. 10. **See Also English v. General Elec. Co., supra** p. 10. The defense is unqualified, and logically so. Complainants attempt to disentangle their alleged additional protected activities from the September 4th and 5th tests is made in vain. Each of the alleged protected activities which pre-date the tests were related to the Curve 8 issue and, as Complainants have stated, resulted in the tests which violated NRC regulations. **See** Motions for Reconsideration and Clarification, ¶ 2. Finally, the alleged protected activities which post-date the tests would not have happened but for the occurrence of the tests.

It is, therefore, determined that the complaints, in their entirety, have been barred.

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[15] In considering this Motion for Summary Decision, this Judge must view the facts in the light most favorable to the nonmoving party. I will note that the evidence renders Complainant Fields' contention that he personally "reported" safety concerns with regards to management directives to maintain critical reactor support and emergency systems to be somewhat dubious. **See** Motion for Reconsideration and Clarification, ¶¶ 2 and 4. **Cf.** Fields Depo., pp. 6, l. 25 – p.7, l. 6; p. 7, ll. 20-24; p. 8, ll. 3-12; p. 21, ll. 13-25; p. 23, l. 10 – p. 24, l. 3; p. 29, ll. 13-25; p. 30, ll. 1-5; p. 31, l. 21 – p. 32, l. 6. For purposes of this Motion, however, this Judge shall assume that Complainant Fields did, in fact, personally engage in this "reporting."

IV. Conclusion

Based on the foregoing, I hereby recommend that Respondent's Motion for Summary Decision be **GRANTED.** I base this recommendation upon an application of the uncontroverted facts to an interpretation of 42 U.S.C. §5851(g) which is consistent with that section's legislative history and underlying policy; consistent with the common usage of the relevant terms; and consistent with what little case law there exists interpreting the section.

/s/ David W. Dinardi
DAVID W. DINARDI
Administrative Law Judge

NOTICE: This Recommended Decision Dismissing Complaint and the administrative file in this matter will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210.

DWD: jw: gcb

SERVICE SHEET

Case Name: **David A. Fields, et al.**

Case No.: **96-ERA-22**

Title of Document: **RECOMMENDED DECISION & ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

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